Supreme Court, U.S.
FILED

99 929 NOV 29 1999

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

Rebecca McDowell Cook,

Petitioner,

v.

Don Gralike,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Do the people violate Article V of the Constitution when they participate in the evolution of their government by communicating their opinion to federal legislators or by communicating on the ballot to voters about the behavior of federal candidates?

II.

Do the people violate the Qualifications Clauses and the First Amendment when they comment on the ballot regarding an elected representative's actions and voting record or when they comment on the ballot about a non-incumbent congressional candidate's silence concerning a prospective constitutional amendment?

III.

Does the Speech and Debate Clause of the Constitution prohibit the people from commenting on the ballot about a federal legislator's actions and voting record in regard to a prospective constitutional amendment?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed n the caption except Michael Harmon, the 1998 Libertarian Party candidate for Missouri's Seventh Congressional District, who intervened as an appellee in the United States Court of Appeals for the Eighth Circuit after Donald Gralike withdrew as a candidate for the House of Representatives.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rebecca McDowell Cook, in her official capacity as the Secretary of State of Missouri, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ["App."] A1-35), entered on August 31, 1999, is reported at 191 F.3d 911. The opinion of the district court granting Gralike summary judgment (App. A27-35) is reported at 996 F.Supp. 917 (W.D. Mo. 1998) and the two district court orders denying petitioner's motions to dismiss (App. A36-81) are not reported.

JURISDICTION

The court of appeals entered its judgment on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1999) and pursuant to Supreme Court Rule 14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article 1, Section 2, Clause 2:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Constitution of the United States, Article 1, Section 3, Clause 3:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Constitution of the United States, Article 1, Section 4, Clause 1:

The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by Law, make or alter such Regulations, except as to the Places of choosing Senators.

Constitution of the United States, Article 1, Section 6, Clause 1:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be

questioned in any other Place.

Constitution of the United States, Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Constitution of the United States, Amendment I:

Congress shall make no law . . . abridging the freedom of speech . . . .

Constitution of the State of Missouri, Article VIII, Section 15:

PREAMBLE. The people of Missouri hereby state our intention that this initiative lead to the adoption of the following U.S. Constitutional Amendment:

Constitution of the State of Missouri, Article VIII, Section 16:

CONGRESSIONAL TERM LIMITS AMENDMENT
(a) No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of the United States Representative or who then holds the office shall serve for more than two additional terms.
(b) No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment

no person who has held the office of United States Senator or who then holds the office shall serve in the office for more than one additional term.

(c) Any state may enact by state constitutional amendment longer or shorter limits than those specified in section "a" or "b" herein.

(d) This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the several States.

Therefore, We, the People of the State of Missouri, have chosen to amend the state constitution to inform voters regarding incumbent and non-incumbent federal candidates' support for the above proposed CONGRESSIONAL TERM LIMITS AMENDMENT.

Constitution of the State of Missouri, Article VIII, Section 17:

VOTER INSTRUCTION ON TERM LIMITS FOR MEMBERS OF CONGRESS

(1) We, the Voters of Missouri, hereby instruct each member of our congressional delegation to use all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth above.

(2) All primary and general election ballots shall have printed the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" adjacent to the name of any United States Senator or Representative who:

(a) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote or;

(b) fails to second the proposed Congressional Term Limits Amendment set forth above if it lacks for a second before any proceeding of the legislative body or;

(c) fails to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above or;

(d) fails to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment set forth above before any committee or subcommittee of the respective house upon which he or she serves or;

(e) fails to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment set forth above or;

(f) fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed Congressional Term Limits Amendment set forth above regardless of any other actions in support of the proposed Congressional Term Limits Amendment set forth above or;

(g) sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above, or;

(h) fails to ensure that all votes on Congressional Term Limits are recorded and made available to the public.

(3) The information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of incumbent candidates for Congress if the Congressional Term Limits Amendment set forth above is before the states for ratification or has become part of the United States Constitution.

Constitution of the State of Missouri, Article VIII, Section 18:

VOTER INSTRUCTION ON TERM LIMIT PLEDGE FOR NON-INCUMBENTS

(1) Non-incumbent candidates for United States Senator and Representative shall be given an opportunity to take a "Term Limit" pledge regarding "Term Limits" each time they file to run for such office. Those who decline to take the "Term Limits" pledge shall have the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their name on every primary and general election ballot.

(2) The "Term Limits" pledge shall be offered to non-incumbent candidates for United States Senator and Representative until a Constitutional Amendment which limits the number of terms of United States Senators to no more than two and United States Representatives to no more than three shall have become part of our United States Constitution.

(3) The "Term Limits" pledge that each non-incumbent candidate, set forth above, shall be offered is as follows:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

Constitution of the State of Missouri, Article VIII, Section 19:

DESIGNATION

(1) The Secretary of State shall be responsible to make an accurate determination as to whether a candidate for the federal legislature shall have placed adjacent to his or her name on the election ballot the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

(2) The Secretary of State shall consider timely submitted public comments prior to making the determination required in subsection (1) of this section and may rely on such comments and any information submitted by the candidates in making the determination required in subsection (1).

(3) The Secretary of State, in accordance with subsection (1) of this section shall determine and declare what information, if any, shall appear adjacent to the names of each incumbent federal legislator if he or she was to be a candidate in the next election. This determination and declaration shall be made in a fashion necessary to ensure the orderly printing of primary and general election ballots with allowance made for all legal action provided in section (5) and (6) below, and shall be based upon each member of Congress's action during their current term of office and any

action taken in any concluded term, if such action was taken after the determination and declaration was made by the Secretary of State in a previous election.

(4) The Secretary of State shall determine and declare what information, if any, will appear adjacent to the names of non-incumbent candidates for the federal legislature, not later than five (5) business days after the deadline for filing for the office.

(5) If the Secretary of State makes the determination that the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall not be placed on the ballot adjacent to the name of a candidate for the federal legislature, any elector may appeal such decision within five (5) business days to the Missouri Supreme Court as an original action or shall waive any right to appeal such decision; in which case the burden of proof shall be upon the Secretary of State to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in the Act and therefore should not have the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidate's name.

(6) If the Secretary of State determines that the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall be placed on the ballot adjacent to a candidate's name, the candidate may appeal such decision within five (5) business days to the Missouri Supreme Court as an original action or shall waive any right to appeal such decision; in which case the burden of proof shall be upon the candidate to demonstrate by clear and convincing evidence that he or she should not have the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidate's name.

(7) The Supreme Court shall hear the appeal provided for in subsection (5) and issue a decision within 60 days. The Supreme Court shall hear the appeal provided for in subsection (6) and issue a decision not later than 61 days before the date of the election.

Constitution of the State of Missouri, Article VIII, Section 20:

AUTOMATIC REPEAL

At such time as the Congressional Term Limits Amendment set forth above has become part of the U.S. Constitution, section 15 through section 22 of this Article automatically shall be repealed.

Constitution of the State of Missouri, Article VIII, Section 21:

JURISDICTION

Any legal challenge to this Amendment shall be filed as an original action before the Supreme Court of this State.

Constitution of the State of Missouri, Article VIII, Section 22:

SEVERABILITY

If any portion, clause, or phrase of this Amendment is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

STATEMENT OF THE CASE

This case concerns an opinion by a circuit court concluding that the Constitution prohibits citizens from communicating their opinion to federal legislators on prospective constitutional amendments and further prohibits the citizens from communicating on the ballot to voters about the behavior of candidates for federal office. While the prospective constitutional amendment at issue involved term limits, this case is not about term limits. Rather, we are concerned here with the right of the people to communicate.

On November 5, 1996, Missouri's voters passed a ballot measure amending Article VIII of the Missouri Constitution by adding new sections 15 through 22. The people themselves proposed the measure by initiative petition.

By amending Article VIII, the people of Missouri called on their elected representatives to enact an amendment to the

Constitution of the United States placing limits on the number of terms that individuals could serve in Congress. *See* Mo. Const. art. VIII, §§ 15 & 16. In section 17 of Article VIII, the voters instructed the members of Missouri's Congressional delegation to use their powers to pass the Congressional Term Limits Amendment included in Article VIII, § 16. The people provided that any member of Congress who failed to engage in eight specified behaviors would have the phrase "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed next to his or her name on subsequent primary or general election ballots. Art. VIII, § 17(2)(a-g).

In Article VIII, section 18, the people offered all non-incumbent candidates for Congress the opportunity to pledge support for the term limits amendment set forth in Article VIII, § 16. The pledge was not mandatory, and a non-incumbent candidate's silence in the face of the opportunity to take the pledge would not prevent the candidate from being on the ballot. Rather, if a candidate responded to the opportunity with silence or affirmative declination, the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" would be printed adjacent to the candidate's name on the primary and general election ballots.

The remaining provisions were procedures for the proper implementation of Article VIII. In Article VIII, section 19, the people gave Missouri's Secretary of State the ministerial task of assessing whether the people would be informed about a candidate's behavior. Section 20 authorized an automatic repeal of Article VIII, sections 15-22, when the Congressional Term Limits Amendment in section 16 became a part of the United States Constitution. Article VIII, section 21 grants the Missouri Supreme Court original jurisdiction to hear any challenges to Article VIII. And Article VIII, section 22 contains a severability clause which, in the event any provision of Article VIII were found to be unconstitutional, would sever the unconstitutional provision from the remainder of the Article.

On December 11, 1996, Donald Gralike filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court for the

Western District of Missouri. Gralike named as a defendant the Missouri Secretary of State, Rebecca McDowell Cook, in her official capacity. In his Complaint, Gralike challenged the constitutionality of Article VIII. Thus, the district court had jurisdiction over the suit pursuant to 28 U.S.C. § 1331 because the suit raised a federal question.

After denying petitioner's two motions to dismiss (App. A36-81), the district court granted Gralike summary judgment on February 18, 1998. In its Order, the district court concluded Article VIII: (1) added qualifications for Congress members in violation of the Qualifications Clauses by commenting on the members performance; (2) violated Gralike's first amendment right to free speech by commenting on either the members statements, actions or silence; and (3) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment. App. A27-35. In response, Cook filed a timely notice of appeal.

On August 31, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the district court, exercising jurisdiction pursuant to 28 U.S.C. § 1291. The majority agreed with the district court and concluded Article VIII: (1) added qualifications for Congress members in violation of the Qualifications Clauses by commenting on the members performance; (2) violated Gralike's first amendment right to free speech by commenting on either the members statements, actions or silence; and (3) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment. App. A14-15. The court of appeals also reached an issue not raised by either party. It determined that Article VIII violated the Speech and Debate Clause of the Constitution by allowing the citizenry to comment on Congress members performance. App. A14-15.

Judge Hansen concurred in part and dissented in part from the majority's holding. He believed the court of appeals should have found Article VIII, §§ 17, 18 and 19 unconstitutional but left the remaining portions of Article VIII untouched, similar to an

earlier panel decision in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999). The judge stated §§ 15 and 16 were only advisory, and thus constitutionally sound. Specifically, Judge Hansen stated he "believed the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I." App. A23-26. The judge continued:

> In fact, "We the People" have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment procedures set out in Article V. However, the people play a crucial, substantive role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures.

App. A24-25.

REASONS FOR GRANTING THIS WRIT

On November 5, 1996, the people of Missouri went to the polls and informed their members of Congress that it was time to amend the Constitution. The people relayed this information by approving an initiative petition placing an "instruct and inform" provision in the Missouri Constitution.[1] But despite the popular will, the United States Court of Appeals for the Eighth Circuit nullified the actions of the citizens of Missouri, determining that the citizens could not advise their elected officials about the need

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[1] On the November 5, 1996, ballot, the instruct and inform provision was entitled Constitutional Amendment No. 9. It garnered more than 57% of the popular vote. And it carried 86 of Missouri's 114 counties. The provision also carried St. Louis City -- a city which is not within any county. *Official Manual of the State of Missouri 1997-1998*, p. 591 (Jim Grebing ed. 1997).

for proposing and ratifying a particular constitutional amendment.

The issue of whether the voters may instruct their Congressional delegation to pass a constitutional amendment and advise their fellow citizens of their representative's behavior regarding the amendment has not arisen in the Eighth Circuit alone. Instead, it has been heard, and decided incorrectly, by Courts across the nation, albeit for differing reasons.

With regard to that portion of the Eighth Circuit's opinion that finds Missourians violated Article V by instructing their congressional delegation to support a particular constitutional amendment, this Court should grant the petition because there is a conflict between the Eighth Circuit's opinion in this case and the Supreme Court of Idaho, an opinion authored by then Justice Rehnquist and an earlier opinion of the Eighth Circuit. With regard to the remainder of the court's holding that Missourians violated Article V, the Qualifications Clauses, the Speech and Debate Clause and the First Amendment by communicating on the ballot about the behavior of candidates for federal office regarding a proposed constitutional amendment, the Court should grant the petition because of the importance of the issues involved; i.e., the citizens' right to communicate and the misapplication of the Constitution to prohibit that communication. It is of grave constitutional concern to the citizenry that so many courts have construed the Constitution to prohibit truthful public speech for the protection of a portion of the candidates for federal office.

Court decisions that interfere with the public's right to communicate occurring at the behest of the electoral process not only frustrate the public will, in this context they undermine America's social contract that provides for the citizenry to determine the form of their government. No provision of the Constitution mandated the Eighth Circuit's interference with the public's right to speak. Unless this Court intervenes, the meaning of various provisions of the Constitution will continue to be perverted and the estrangement of the people from the government they once ordained will continue to be exacerbated. The Court should grant the petition for a writ of certiorari to preserve the

integrity of the Constitution and secure the liberties of the American people.

I. A CONFLICT EXISTS BETWEEN THE LOWER COURTS AS TO WHETHER ARTICLE V PROHIBITS CITIZENS FROM ADVISING FELLOW VOTERS AND THEIR ELECTED REPRESENTATIVES ON A PROSPECTIVE AMENDMENT, A CONFLICT THAT THE HISTORY OF ARTICLE V RESOLVES IN FAVOR OF CITIZEN PARTICIPATION.

A panel of the Eighth Circuit held that the people of Missouri could not instruct their elected representatives to use their powers to propose a particular amendment to the Constitution because such an instruction would usurp Congress's Article V power. There exists conflicts between many federal courts and the Supreme Court of Idaho, a prior opinion of the Eighth Circuit and the opinion of the Chief Justice on this issue. *Compare Barker v. Hazeltine*, 3 F.Supp.2d 1088 (D. S.D. 1998) (invalidated instruct and inform provision on Article V, First Amendment, Speech and Debate, and Due Process grounds); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D. Me.1997) (invalidated instruct and inform provision on Article V grounds); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996) (instruct and inform initiative invalidated on Article V and state constitutional law grounds);[2] *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999) (invalidated instruct and inform provision on Article V and state initiative law grounds); *Morrissey v. State of Colorado*, 951 P.2d 911 (Colo. 1998) (invalidated instruct and inform provision on Article V grounds) and *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (invalidated instruct and inform provisions on Article V and state constitutional grounds) with *Simpson v. Cenarrusa*, 944 P.2d 1372

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[2] This court denied certiorari. *Arkansas Term Limits v. Donavon*, 519 U.S. 1149 (1997). However, in *Donavon*, there were independent state grounds that precluded review. The Arkansas Supreme Court found that the initiative petition that created the instruct and inform provision violated Amendment VII of the Arkansas Constitution. 931 S.W.2d at 371. Here no state law issues preclude review of the Eighth Circuit's decision.

(Idaho 1997) (invalidated instruct and inform provision on First Amendment, Speech and Debate Clause, and state constitutional grounds, but expressly held that the instruct provision did not violate Article V); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (invalidated only the inform portion of Nebraska's instruct and inform provision on Article V grounds) and *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., sitting as Circuit Justice) (Article V does not prohibit citizens from advising their legislators on a prospective constitutional amendment).

In reaching the conclusion that the Constitution prohibited the people of Missouri from instructing their elected representatives to propose an amendment to the Constitution (App. A22, n. 12) the Eighth Circuit opined that Article V "specifically delegates the amendment process to the legislative bodies, not the voters." App. A20. While Article V delegates the functions of official amendment proposal and passage to the legislative bodies, the Constitution does not thereby constrain the citizenry to silence during the constitutional drama.

The Court's holding elevates legislators to the level of paternalistic aristocrats and simultaneously demeans them as irresolute souls incapable of withstanding the meaningless chatter of their lesser citizens.[3] Apparently, according to the Eighth Circuit, the founders so feared citizen influence over hapless elected officials, they wrote Article V for the purpose of insulating overly-responsive legislators from the presumptively unsound influences of the governed. This ruling is not only anti-democratic, it ignores the pre- and post- ratification history of the Constitution.

A. The History of Citizen Instructions.

[3] This type of governmental paternalism was best evidenced in *Barker*, cited in *Gralike*. App. A2. The district court in *Barker* found that the amendment process was "to be a deliberate and often difficult task," with the "citizens' role to elect competent state and Congressional legislators who may, in turn, amend the Constitution in accordance with the methods described in Article V." 3 F.Supp.2d at 1092 (citation omitted). Apparently, simple voters were to be seen but not heard.

Throughout the history of the United States, the people have instructed their representatives on the form of government they desired. The delegates to the Second Continental Congress from the states of North Carolina, Virginia, and New Jersey were all under instructions from their respective home colonies to vote for independence.[4] In fact, the delegates from New York considered their instructions to be so important that they read them aloud before the Continental Congress.[5]

Even more compelling evidence of the Framer's intention to allow citizens to instruct their delegates about prospective constitutional amendments is the fact that several Framers were acting pursuant to instructions when they drafted the Constitution itself. For example, Delaware's delegates to the Constitutional Convention were acting under specific instructions to preserve the Fifth Article of the Articles of Confederation, which provided each state would receive a single vote in Congress.[6]

Further, the statements of the framers themselves indicate that they understood the people to be able to instruct their delegates

[4] *See* Independence in North Carolina (April 12, 1776), *reprinted in* 5 *American Archives, Fourth Series* 859, 859 (Peter Force ed., 1844); Records of the Virginia Convention (May 15, 1776), *reprinted in* 6 *American Archives, Fourth Series* 1523, 1524 (Peter Force, ed., 1846); Records of the New York Provincial Congress, *reprinted in* 6 *American Archives, Fourth Series* 1364, 1364 (Peter Force, ed., 1846); *all cited in*, Kris W. Kobach, *May "We The People" Speak? The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. Davis L. Rev. 1 (forthcoming Dec. 1999) (manuscript at pp. 44-46, lodged with the Court and on file with the author). In fact, surviving records indicate that the delegates from nine of the thirteen colonies acted pursuant to instructions from home.

[5] Records of the Continental Congress (June 28, 1776), *reprinted in* 6 *American Archives, Fourth Series* 1725, 1725 (Peter Force, ed., 1846); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 53).

[6] 3 *The Records of the Federal Convention of 1787* 574-575 (Max Farrand ed., 1966); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 66).

to Congress. In reference to a possible, future increase in the size of Congress, Alexander Hamilton commented:

> "[i]f the general voice of the people be for an increase, it must undoubtedly take place. They have it in their power to instruct their representatives; and the State Legislators, which appoint the Senators, may enjoin it also upon them."[7]

Additionally, in reference to the amendment process itself, John Dickinson, delegate from Delaware, stated:

> [f]or this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations [to the Constitution] respectively required by them, and to enjoin their representatives, to employ every proper method to obtain ratification.[8]

Several states also instructed their representatives to the first Congress on how to vote on the Bill of Rights and the Eleventh Amendment. Congressmen from Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina all arrived at the first Congress bearing instructions as to their vote on the Bill of Rights.[9] And in the wake of *Chisolm v. Georgia*, 2 U.S.

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[7] Alexander Hamilton, Statement before the New York Ratifying Convention (June 23, 1788), *reprinted in* 2 *Elliot's Debates*, at 252 (Jonathon Elliot ed., 1836) (June 21, 1788); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at pp. 72-73).

[8] John Dickinson, *The Letters of Fabius, Pamphlet No. VII* (1797), *reprinted in Friends of the Constitution: Writings of the "Other" Federalists 1787-1788*, at 496 (Colleen A. Sheehan and Gary L. McDowell eds., 1998); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 70).

[9] Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 76) (citations omitted).

(2 Dall.) 419 (1793), the legislatures of Massachusetts, Virginia, Connecticut and North Carolina instructed their Senators to seek a constitutional amendment that would deny federal courts jurisdiction over suits by citizens against states.[10]

This tradition of instruction continued into the Twentieth Century. In 1928, the voters of Massachusetts, by initiative, instructed their State Senators to repeal the Eighteenth Amendment.[11] And in 1933, the state of Oregon held a statewide referendum to determine how the state's delegates to the statewide convention[12] should vote on the ratification of the Twenty-First amendment. The people voted in favor of ratification and, seventeen days later, the state convention ratified the Twenty-First Amendment.[13] Accordingly, the intent of the Framers and the weight of history demonstrate the constitutionality of citizen instructions to their representatives in Congress regarding how vote on a prospective amendment.[14]

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[10] Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 85) (citations omitted).

[11] *See* 1929 *Mass. Acts* 544-52 (tallying votes of senatorial districts); Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government*, at 476-477 (1930); *both cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 97).

[12] The Twenty-First Amendment, unlike any other amendment to the Constitution, was sent to state-wide conventions, not state legislators, for approval. Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 100).

[13] 1933 Oregon Laws, 2d Special Sess. 10 (1933); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at pp. 100-101).

[14] While the history on the inform provisions is not as developed, the reason for this lack of development is readily apparent: At the time of the Framers, no self-respecting Congressman would remain in Congress after ignoring the instructions of their constituents. Instead, they would simply retire on their own, thus eliminating any need for an inform provision. In fact, two future presidents, John Quincy Adams and John Tyler, actually did retire after ignoring the instructions of their constituents. Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep*

B. Conflicting Opinions and the Misinterpretation of the Constitution.

Most courts that have analyzed instruct and inform provisions have failed to discern or simply ignored the history of Article V, erroneously relying on *Hawke v Smith*, 253 U.S. 221 (1920); and *Leser v. Garnett*, 258 U.S. 130 (1922). *See Gralike*, App. A19-22. But neither case is relevant to the issue at hand, a fact noted by Chief Justice Rehnquest in *Kimble*. *See* 439 U.S. at 1387 (applicant's reliance on Court's decision in *Hawke* and *Leser* "is obviously misplaced").

In *Hawke*, the Court struck down on Article V grounds a provision of the Ohio Constitution that gave the people final authority to approve or reject an amendment to the Constitution. In *Leser*, the Court again held that the actual power to ratify an amendment may not be altered by the people of a state, but the Court in *Leser* made no mention of the citizens supposed inability to instruct their legislators.[15] 258 U.S. 130. While both these cases dealt with a direct attempt to modify the ratification process, Missouri's Article VIII does no such thing. Rather, it informs the Missouri delegation to Congress of their constituent's wishes. It is still the Senators and Representatives who will cast the vote. Accordingly, Missouri's Article VIII in no way alters the process established by Article V.

Nevertheless, most courts evaluating instruct and inform provisions have determined that they violate Article V. Fortunately, some courts have conducted a more exacting analysis. In *Simpson*, the Idaho Supreme Court conducted an Article V review of legislation instructing Idaho's elected representatives to

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Trying to Change It? at 123 (1993); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 90).

[15] In fact, in the years following the Court's decision in *Leser*, the citizens of Massachusetts and Oregon did instruct their legislators or delegates how to vote on an amendment. Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at pp. 97 & 100-101).

support term limits. The Court found no Article V violation because the legislators, when merely directed to support term limits, "were not compelled to support the proposed amendment." 944 P.2d at 1376. Hence, the Article V process was undisturbed.

Similarly, in *Kimble*, then Justice Rehnquist held that it was constitutional for the citizens of Nevada to advise their legislators how to vote on the Equal Rights Amendment. 439 U.S. 1385. He said, "I would be most disinclined to read either *Hawke*, . . . *Leser* . . . or Art. V as ruling out communication between members of the legislature and their constituents." *Id.* at 1387-88. He further noted that, despite the referendum, the legislators could still vote as they saw fit, thus the referendum was non-binding. *Id.* at 1387. *See also Miller*, 169 F.3d at 1126 and *Gralike*, (Hanson, J., dissenting), App. A23-26, (determining that the citizens could constitutionally express their opinions on prospective constitutional amendments by way of initiative petitions).

The Eighth Circuit Court of Appeals attempted to distinguish *Kimble* by asserting that Missouri's Article VIII is "far more" than the non-binding referendum found in *Kimble*. App. A21. This truism is not a substitute for applying the principles articulated in *Kimble* to the facts of the case. According to the Chief Justice, only those matters that change the actual process set out in Article V are of constitutional significance. That the Nevada legislature was likely to delay a vote on the amendment until after the non-binding referendum did not alter the constitutional process and was "not a constitutionally cognizable grievance." *Id.* at 1387. Not surprisingly, following the vote, the Nevada legislature complied with their citizen's wishes. But political responsiveness is not indicative of a constitutional violation.

Like *Kimble*, Missouri's Article VIII does not run afoul of Article V because it does nothing to change the Article V process for amendment ratification. But the Eighth Circuit found that Missouri's Article VIII violated Article V because it bound legislators to vote in favor of a constitutional amendment. App. A21-22. In reaching this conclusion, the Eighth Circuit made two

unsubstantiated assumptions;[16] one, that the ballot information would operate as a handicap on candidates and, two, that candidates would ignore their own principled opinion despite the constitutional significance of their behavior to avoid the supposedly coercive impact of the ballot information. App. A21-22. Such assumptions are antithetical to our constitutional jurisprudence.

There is a dearth of evidence on the issue of handicap and respondent bore the burden of proof. That 57% of Missouri's electorate favored the term limits proposal at the 1996 election does not turn the ballot information into a penalty. The voters in subsequent years might have a different political view. In the twenty-eight counties that failed to support the amendment of Article VIII,[17] the ballot information may be a benefit. Truthful words cannot properly be denominated a penalty when their supposed penal nature is entirely dependent on the potentially changing opinions of the electorate. For example, in many locales it is reasonable to assume a particular party designation may have the "likely effect" of handicapping a candidate. But it is constitutional to require party candidates to run with their party designations on the ballot. Respondent never demonstrated a difference of constitutional significance between compulsory party designation and the ballot information Missourians now seek to put on the ballot.[18]

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[16] This is not the first time the Eighth Circuit has made unfounded assumptions when assessing the validity of an election law. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997); this Court noted that "[t]he Court of Appeals emphasized its belief that, without fusion-based alliances, minor parties cannot thrive. This is a predictive judgment which is by no means self-evident."

[17] *Official Manual of the State of Missouri 1997-1998*, p. 591 (Jim Grebing ed. 1997).

[18] The Eighth Circuit does criticize the words chosen by Missourians to communicate about the behavior of federal candidates, describing it as language "likely to give (and we believe calculated to give) a negative impression not only of the labeled candidates' views on term limits, but also of his or her commitment and accountability to his or her constituents." App. A9. While it is not insignificant that the Court is so at ease measuring the words chosen by the people

The Eighth Circuit's second assumption, unstated but implicit and necessary to find Article VIII binding, is far more insidious. No judge charged with the obligation to preserve the Constitution should assume that members of Congress are craven, office-seekers who will disregard their principles and the constitutional significance of their behavior, voting only for constitutional enactments they perceive will enhance their likelihood of re-election.[19]

The Eighth Circuit's assumptions were false. Article VIII is by its terms non-binding; it does not alter the process established by Article V. While it does advise the members of Congress how the people want them to vote, they "may vote for or against ratification, or refrain from voting on ratification at all, without regard to the [people's instruction]." *Kimble*, 439 U.S. at 1387. Nothing in Article V prohibits Missourians from communicating with one another on the ballot. In fact, while this Court has found that the ballot can be used "to communicate information," *Timmons*, 520 U.S. at 363, the same cannot be said with any

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to communicate their ideas, it is obvious that the Court paints with too broad a brush. See App. A18, where the Court says that the "labels state that the labeled candidates ignore their constituents' wishes." While the statement to be applied to incumbents ("disregarded voters' instructions on term limits") may have some risk despite its relatively nebulous nature of leaving a negative impression with voters, the statement to be applied to non-incumbents ("declined to pledge to support term limits") is a completely neutral statement of fact regarding a candidate's behavior that embodies no such risk and it is only this later label that could have been applied to respondent. If it was only the language selected by Missourians to communicate their ideas that offends the Constitution, the Eighth Circuit failed in its obligation to so state.

[19] In fact, available evidence is to the contrary. Missouri Representative Jo Ann Emerson announced on the floor of the House that she would depart from the instructions of her constituents. Though Article VIII instructed Rep. Emerson to vote against any term limits proposal of more than six years, she declared that she "w[ould] vote in favor of each and every serious term limits proposal brought before the House," not just the one set forth in Article VIII. Statement 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson). Apparently, Rep. Emerson did not consider the ballot information a significant handicap as she was quite capable of overlooking it or she was guided by her duty to vote her conscience regardless of the consequences.

degree of certaintity after the Eighth Circuit's chilling decision.

The Eighth Circuit erred in finding that Missouri's Article VIII violated Article V. It was an error that ignored the intent of the Framers, the history surrounding the ratification of our Constitution, the opinion of the Chief Justice of this Court and the right of the people to participate meaningfully in their government. It is an error that can only be corrected by this Court.

II. THE EIGHTH CIRCUIT SERIOUSLY MISCONSTRUED THE CONSTITUTION IN HOLDING THAT A MERE COMMENT ON THE SILENCE OR RECORD OF A CANDIDATE FOR CONGRESS CREATED A NEW QUALIFICATION FOR SERVICE IN CONGRESS.

In its opinion striking down Article VIII of the Missouri Constitution, the Eighth Circuit found that allowing the people to publicly comment on a congressional candidate's behavior violated the Qualifications Clauses. App. A15-19. But there is no legal basis for the Eighth Circuit's opinion because this information neither directly nor indirectly places an additional qualification on members of Congress. This Court should grant the petition to correct this error and forestall its far-reaching implications.

The United States Constitution restricts who may appear on a ballot as a candidate for Congress through the Qualification Clauses. U.S. Const., art. I, §§ 2 & 3. The restrictions found in the Qualifications Clauses are fixed and exclusive. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995). However, Missouri does not place an additional qualification on service in Congress; all Missourians over the age of twenty-five who have been U.S. citizens for more than seven years may still be elected to the House of Representatives and may still appear on the ballot.

Of course, Missourians cannot indirectly place an additional qualification on a candidate for Congress. *U.S. Term Limits*, 514 U.S. at 836. But Article VIII places no indirect qualifications on candidates. In *U.S. Term Limits*, the Court held that a state amendment that disqualifies a class of candidates *and* has the sole

purpose of creating additional qualifications indirectly violates the Constitution. *Id.* Thus, *U.S. Term Limits* requires *both* an electoral injury and an intent to create additional qualifications for a finding of unconstitutionality. Article VIII does neither.

The Eighth Circuit simply assumed that having the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appearing by a candidate's name would have the "likely effect" of handicapping the candidate. As discussed above, the Eighth Circuit's assumption is not supported by any facts in the record. And the mere fact that some voter "might," in the opinion of the Eighth Circuit, be affected by such language does not create a constitutionally impermissible handicap.

Further, it was not the people of Missouri's intent to create an additional qualification for Congress when they passed Article VIII. Instead, their intent was to amend the Constitution and for that amendment to create a limitation on congressional service. In fact, Article VIII, section 15, specifically states that the intent of Article VIII is to amend the Constitution. Despite this, the Eighth Circuit concluded that the intent of people of Missouri was to add an additional qualification for service in Congress. App. A18-19. While the desired amendment would alter the Constitution to place a limitation on members of Congress, that fact does not alter the people's purpose. The people's purpose was to effect the amendment of the Constitution[20] and construing the same to run afoul of the Qualifications Clauses has a broad range of significant adverse consequences. Suppose, for example, that the citizens of a state directed an executive office holder to prepare a ballot

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[20] The Eighth Circuit claims that, as the people of Missouri seek to amend the Constitution to add a limitation on congressional service, their actions run afoul of the Qualifications Clauses because their purpose is the addition of a new qualification. App A18. The fact that Missourians seek to effectuate this change by amending the Constitution is, apparently, irrelevant. This argument goes too far. It would place a bar on public support for any amendment to the Qualifications Clauses. This simply cannot be. Instead, when assessing the purpose behind the actions of the people, the Court should draw distinction between the purpose of the action, amending the Constitution, and the purpose of the desired amendment, creating a new qualification for service in Congress.

information sheet containing the voting records and absentee percentages of candidates, directing that the same be available at polling places. Would candidates for federal office be able to challenge the ballot information sheet, to the extent they felt historical facts portray them in a negative light, asserting that the communication created an additional qualification for office? While nothing in the Constitution mandates such a result, nothing in the Eighth Circuit's opinion precludes it.

Furthermore, the Eighth Circuit's conclusion that Missouri's Article VIII violates the Qualifications Clauses utterly ignores the Constitution's affirmative grant of power to the states. The Constitution grants states "broad power to prescribe the 'Time, Place and Manner of holding elections for Senators and Representatives.'" *Timmons*, 520 U.S. at 358, quoting from *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). All Article VIII of the Missouri Constitution does is disclose whether candidates for Congress performed as their constituents wished or remained silent when offered an opportunity to support term limits. Congress has enacted no law prohibiting the people of a state from adopting this manner of conducting an election and the Constitution contains no prohibition on this activity. Hence, the Constitution's default provision, Art . I, § 4, cl. 1, which "invests the States with responsibility for the mechanics of congressional elections," controls. *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 466 (1997).

The Eighth Circuit's failure to recognize that Missourians have successfully walked a constitutional tightrope was error. It was error that deprived the people of their voice in government and that took from the people an opportunity to control their own government. It is an error that only this Court can correct.

III. MISSOURIANS DID NOT VIOLATE THE FIRST AMENDMENT BY COMMUNICATING ABOUT THE ACTUAL OR DESIRED CONDUCT OF CANDIDATES FOR FEDERAL OFFICE AND THE EIGHTH CIRCUIT'S CONCLUSION THAT THEY DID CREATES A DANGEROUS PRECEDENT.

The Eighth Circuit found Missouri's Article VIII violative of the First Amendment without even conducting a complete analysis; lumping the regulations for incumbents in with those for non-incumbents. By this flawed analysis, the Eighth Circuit deprived the people of their own right to speak without even balancing the people's right against that of the candidates. This Court should grant the petition for a writ of certiorari so that people's voice can be restored.

The people's right to know and the related right to receive information are recognized by the Supreme Court as fundamental tenets of the First Amendment. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Constitution protects rights to receive information and ideas). In an attempt to transform this right from an ideal into a reality, the citizens of Missouri requested information about their Congressional candidates' position on term limits. And by doing so, the people did not violate the First Amendment; instead they exercised their own First Amendment rights. Furthermore, they exercised these rights in a way that did not limit the speech of the candidates.

The First Amendment to the United States Constitution states that "[C]ongress shall make no law . . . abridging the freedom of speech . . .." U.S. Const. amend. I. However, freedom of speech does not mean that a person can say (or keep from saying) anything. And in the non-criminal context, this Court has repeatedly held that it is appropriate to comment on another's silence, and even draw an inference from another's silence. *See e.g., Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 1252-1253 (1998); *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976). Insofar as Article VIII, section 17 applies to non-incumbents, that is all that occurs. The people comment on the candidate's failure to take a pledge to support a term limits amendment.[21] Mo. Const. art. VIII, § 17. They do not require the

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[21] For incumbents, the people simply comment on the incumbent's failure to propose or support a particular term limits amendment. Mo. Const. art. VIII, § 17(2)(a-g). Thus, petitioner's argument that no free speech right of a non-incumbent is being violated can be made with equal force as to incumbents.

candidate to take the pledge; nor do they punish the candidate for failing to take the pledge. The people simply observe that a candidate did not take the pledge. And that is constitutionally sound.

Instead of recognizing the constitutionality of Article VIII, the Eighth Circuit relied on *Wooley v. Maynard*, 430 U.S. 705 (1977); and *Miami Herald Pub. Co., v. Tornillo*, 418 U.S. 241 (1974), for the proposition that the government may not compel someone to speak. Concededly, the Court did find compelled speech to be unconstitutional in these two cases, but these cases are inapplicable to an analysis of Article VIII because it does not compel any speech. In both *Wooley* and *Miami Herald*, the government compelled speech under threat of criminal prosecution. Article VIII does no such thing. Instead, the people simply comment on the silence or behavior of their congressional candidates. The peoples' communication is not punishment.[22] Accordingly, the court of appeals reliance on *Wooley* and *Miami Herald* was misplaced.

Further, once the court of appeals erroneously concluded that Article VIII abridged speech, it then failed to apply the proper test to determine whether the Article is constitutional. Under *Timmons*, there is no one test for determining whether an election law, like Article VIII, violates the First Amendment. 520 U.S. at 358-59 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). Rather, the level of scrutiny is dependent on the burden the election law places on the plaintiff's rights. *Timmons*, 520 U.S. at 358-59. But instead of making this assessment, the Eighth Circuit committed the same error it committed in *Timmons* itself: it simply assumed that strict scrutiny applied. *Gralike*, App. A11-14. The Eighth Circuit simply never made the assessment about the First Amendment

[22] In its First Amendment analysis, the Eighth Circuit committed the same error that was prevalent throughout its opinion. The court assumed that the ballot information would be some sort of punishment. The court based this assumption on the feeling that a ballot information would cause voters to not vote for a candidate. However, no evidence on this point was produced and, hence, it is unclear what effect the ballot information would have on any election.

burden articulated in *Timmons* and *Burdick*.[23] Thus, it failed to apply the test mandated by this Court.

The Eighth Circuit should have recognized that Article VIII compels nothing and, hence, avoids the strictures of the free speech clause. And failing that, it should have applied the proper test to determine whether this election regulation was unconstitutional. The Eighth Circuit's failure to do either was error, an error that ignored the language of Article VIII, that deprived the people of their right to speak about the behavior of political candidates and an error that can only be corrected by this Court.

IV. MISSOURIANS DID NOT VIOLATE THE SPEECH AND DEBATE CLAUSE BY COMMENTING ON THE BEHAVIOR OF MEMBERS OF CONGRESS WHO WERE RUNNING FOR RE-ELECTION AND THE EIGHTH CIRCUIT'S CONCLUSION TO THE CONTRARY HAS FAR-REACHING, ADVERSE CONSEQUENCES.

The Eighth Circuit essentially held that the Speech and Debate Clause of the U.S. Constitution is violated when citizens comment on their Congressional representative's behavior. App. A14-15. This argument is both anti-democratic and absurd. Taken to its logical conclusion, the Eighth Circuit's opinion would lead to the creation of an Congressional aristocracy, immune from the criticisms of we simple voters.

While the Eighth Circuit was correct in citing to *Gravel v. United States*, 408 U.S. 606 (1972), for an understanding of the Speech and Debate Clause, the court incompletely quoted *Gravel*

[23] Concededly, in footnote 8 of its opinion, the court of appeals claimed that even under *Burdick*, strict scrutiny would apply because Article VIII is a content-based and viewpoint-based speech restriction. *Gralike*, App. A12-13. This is a misinterpretation of *Burdick*. Under *Burdick*, a court, when determining the constitutionality of an election law, should look to the "character and magnitude" of the restriction on speech and not its classification. 504 U.S. at 434 (citation omitted). Thus the use of labels such as content-based and viewpoint-based does not effect the analysis. What effects the analysis is the amount of speech restricted, an assessment the Eighth Circuit failed to make.

to the detriment of its analysis concerning Missouri's Article VIII. In *Gravel*, this Court acknowledged that "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats *from the Executive Branch*. It thus protects Members *against prosecutions* that directly impinge upon or threaten the legislative process." *Id.* at 616 (emphasis added).[24] In other words, the Speech and Debate Clause was designed to keep Congress people from being criminally prosecuted for the statements they make on the floor of Congress. *See U.S. v. Helstoski*, 442 U.S. 477, 488 (1979) ("the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts"). Of course, the protections of the Speech and Debate Clause extend to civil prosecutions as well. *U.S. v. Johnson*, 337 F.2d 180, 190 (4th Cir. 1964), *aff'd.*, 383 U.S. 169 (1966). But the information placed on the ballot by Missourians pursuant to the terms of Article VIII is not the constitutional equivalent of a prohibited criminal or civil prosecution or feared executive action. It is, rather, protected public commentary on the behavior of congressional candidates. The Speech and Debate Clause was never intended to insulate politicians from the political consequences of their behavior imposed by their constituents.

By the misuse of ellipses, the appellate court's rationale compels a conclusion that the Speech and Debate Clause prohibits anyone from commenting on a Senator or Representative's actions while on the floor of Congress. The Eighth Circuit ignored the purpose of the Speech and Debate Clause when reaching its conclusion, i.e. to allow Senators and Representatives to debate the issues of the day without fear of prosecution by the Executive Branch. *Gravel*, 408 U.S. at 616. Article VIII neither involves any real discretionary action on the part of a member of the Executive Branch, nor does it involve a prosecution. All it involves is the comment by the people on the behavior of a candidate for Congress. And that is not only constitutional, it is commendable.

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[24] The underline indicates that portion of this Court's language the Eighth Circuit omitted from its rendition of this Court's holding. App. A15.

While the Eighth Circuit was correct in noting that Article VIII did involve some executive action, the executive action at issue is merely ministerial. It is the Secretary of State who places the information on the ballot. But the people have given the Secretary specific guidelines that she must follow when making the decision whether to place the information on the ballot. The Secretary must place ballot information next to an incumbent candidate's name if, and only if, the candidate meets one of criteria specifically outlined in Article VIII, § 17(2)(a-g); or if, and only if, a non-incumbent candidate refuses to pledge to support term limits. Mo. Const. art. VIII, § 18, cl. 1. In neither case is the Secretary afforded discretion in making her decision. If a candidate fails to follow the instructions of the voters or fails to pledge to follow the voter's instructions, then the Secretary must place the corresponding information next to the candidate's name. But if a candidate follows the voters instructions or pledges to follow them, the Secretary is prohibited from placing a comment next to the candidate's name. The Secretary's determination is directly reviewable by the Missouri Supreme Court. Article VIII, § 19. Thus, under Article VIII, the Secretary of State applies the check list the people have given her. No significant executive action is undertaken. Rather, the will of the people is carried out by their agent, the Secretary of State. *See also Matter of Impeachment of Moriarty*, 902 S.W.2d 273, 277 (Mo. 1994) (the vast majority of the duties assumed by the Missouri Secretary of State are ministerial, especially in the area of elections).

Even more fundamentally, Article VIII does not involve a prosecution of members of Congress for their legislative acts. Instead, Article VIII simply involves the people informing themselves about the performance of the candidates for Congress. As Article VIII does not involve any action even remotely approaching a prosecution it does not afoul of the Speech and Debate Clause, which "was designed to preclude prosecution of Members for legislative acts." *Helstoski*, 442 U.S. at 488.

Despite this, the Eighth Circuit found Article VIII to violate the Speech and Debate Clause. This ruling was in error. It was an error that other courts have already committed, that deprives the

people of their voice in government and that only will be corrected if this Court grants the petition for a writ of certiorari.

CONCLUSION

The Eighth Circuit reports that nine states, including Missouri, passed instruct and inform provisions at the November 1996 election. App. A2, n.3. Of those nine, courts have erroneously found the provisions of seven states constitutionally infirm. There are few remaining opportunities for the Court to correct the flaws inherent in these cases; flaws that chill the public's right to communicate and misconstrue the Constitution.

For this reason, along with those stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1494

Donald James Gralike,
Plaintiff-Appellee,
Mike Harman,
Intervenor on Appeal,
v.
Rebecca McDowell Cook,
Defendant-Appellant.

Professor Kris W. Kobach,
Amicus on Behalf of Appellant.
League of Women Voters of the United States;
League of Women Voters of Missouri,
Amici on Behalf of Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 16, 1998
Filed: August 31, 1999

Before McMILLIAN, FLOYD R. GIBSON and HANSEN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellant Rebecca McDowell Cook, in her official capacity as Secretary of State of the State of Missouri, appeals from a final order entered in the United States District Court[1] for the Western District of Missouri granting summary judgment in favor of appellee Donald James Gralike, and invalidating as unconstitutional the 1996 Missouri ballot initiative concerning term limits for

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[1]The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

members of the United States Congress, codified at Article VIII, Sections 15-22 of the Missouri Constitution.[2] *See Gralike v. Cook*, 996 F. Supp. 917 (W.D. Mo. 1998) (*Gralike III*). For reversal, Cook argues that the district court erred in granting summary judgment for appellee because the amendment does not violate the First Amendment or Articles I or V of the United States Constitution. For the reasons discussed below, we affirm the judgment of the district court.

Jurisdiction in the district court was proper based upon 28 U.S.C. §§ 1331, 1343. Jurisdiction on appeal is proper based upon 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

I. BACKGROUND

In November 1996 the voters of Missouri passed an amendment to Article VIII of the Missouri Constitution (hereinafter "Missouri Amendment" or "Amendment") to limit the number of terms any individual may serve in the United States Congress. The Amendment seeks to limit congressional service to three terms in the House of Representatives and two terms in the Senate.[3] *See*

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[2]In this order, the District Court referred to its January 29, 1998 order, 996 F. Supp. 901 (W.D. Mo. 1998), for the legal analysis supporting its decision that the amendment was unconstitutional on Article I, Free Speech, Article V, and vagueness grounds.

[3]Similar initiatives were on the ballot in thirteen other states in November 1996. In Alaska, Arkansas, Colorado, Idaho, Maine, Nebraska, Nevada and South Dakota voters approved the initiatives, while in Montana, North Dakota, Oregon, Washington, and Wyoming they rejected them. *See* Robert Pear, *The 1996 Elections: The States--The Initiatives*, N.Y. Times, Nov. 7, 1996, at B7.

As of the writing of this opinion, the initiatives in Arkansas, Colorado, Idaho, Maine, Nebraska, South Dakota, and Missouri have been invalidated in federal and state courts on various state and federal constitutional grounds. *See Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (Nebraska initiative invalidated on Article V and right to vote grounds); *Barker v. Hazeltine*, 3 F. Supp.2d 1088 (D.S.D. 1998) (invalidated on Article V, First Amendment, Speech and Debate, and Due Process grounds); *League of Women Voters of Maine v. Gwadosky*, 966

MO. CONST. Art. VIII, § 16. To achieve this goal, the Missouri Amendment orders members of Missouri's congressional delegation to use their authority to amend the United States Constitution to impose term limits in § 16 on Congressional service. *See id.* § 17.

If a Missouri Representative or Senator fails to comply with this order, the Missouri Amendment dictates that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed next to his or her name on all ballots during the next election. *Id.* The Missouri Amendment defines a failure to comply with the instructions as: (1) failure to vote in favor of a term limit amendment conforming with § 16; (2) failure to second it if a second is lacking; (3) failure to propose or otherwise bring to a vote a term limit amendment conforming with § 16; (4) failure to vote favorably on measures to bring such an amendment before committee; (5) failure to vote against all measure to delay, table, or otherwise prevent a vote by the full body; (6) failure to vote against amendments allowing longer terms of Congressional service than § 16 allows; (7) sponsoring or cosponsoring an amendment with longer terms than those in § 16; and (8) failure to ensure that all votes on term limits are recorded and available to the public. *See id.*

The Missouri Amendment requires non-incumbent candidates to take a pledge to use their authority to amend the United States Constitution to impose the term limits in § 16 if elected. It orders that those who do not take the pledge have the

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F. Supp. 52 (D.Me. 1997) (invalidated on Article V grounds); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996) (a pre-election challenge, initiative invalidated on Article V grounds); *Morrissey v. Colorado*, 951 P.2d 911 (Colo. 1998) (invalidated on Article V grounds); *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (invalidated on First Amendment, Speech and Debate Clause, and state constitutional grounds); *In re: Initiative Petition No. 364, State Question No. 673*, 930 S.W.2d 186 (Okla. 1996) (invalidated on Article V and state constitutional grounds).

Yet another similar initiative was passed in California in June 1998. The Supreme Court of California invalidated it on Article V and state initiative law grounds. *See Bramberg v. Jones*, 20 Cal.4th 1045, 1054-64 (Cal. 1999).

label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed next to their names on the ballot. *Id.* § 18. To avoid being labeled on the ballot, non-incumbent candidates must take the following pledge:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

§ 18(3).

For both incumbent and non-incumbent candidates, the Missouri Amendment requires the Secretary of State to decide whether a label will be printed on the ballot and to consider public comment in making that determination. *See id.* § 19 (1-4). It allows individual voters to appeal the Secretary of State's decision not to print the label by a candidate's name directly to the Missouri Supreme Court, in which case the Secretary of State must produce clear and convincing evidence that the candidate conformed with the initiative or took the pledge. It also permits a candidate, whom the Secretary of State decides shall have the label appear next to his or her name on the ballot, to appeal this decision to the Missouri Supreme Court, in which case the candidate must produce clear and convincing evidence why the label should not be printed on the ballot. *See id.* § 19 (5-6). In addition, the Missouri Amendment automatically repeals itself if and when the United States Constitution is amended to conform with the § 16 term limits. *See id.* § 20. It also grants the Missouri Supreme Court original jurisdiction to hear challenges to the Amendment. *See id.* § 21. Finally, it contains a severability clause. *See id.* § 22.

Soon after its passage, appellee initiated this action in federal district court challenging the Missouri Amendment on several federal constitutional grounds. Appellee is not currently a member of the Missouri congressional delegation, but he was a

candidate for the third district Congressional seat in 1998 and has issued a declaration of his intent to run for the same seat in 2000. The district court issued three memorandum orders addressing different motions by the parties. In the first order, the district court denied in part and granted in part appellant's motion to dismiss, finding that appellee did have standing to sue, did meet the requirements for injunctive relief, that appellant was not protected by Eleventh Amendment immunity, that the court need not abstain from judgment since there were no unanswered questions of state law, and that the court need not certify questions of federal law to the Missouri Supreme Court since that court has held that it lacks jurisdiction over such questions.[4] *See Gralike v. Cook*, 996 F. Supp. 889 (W.D. Mo. 1998) (*Gralike I*). In its second order, the district court granted in part and denied in part appellant's motion to dismiss for failure to state a claim; it denied appellant's motion to dismiss appellee's claims that the Missouri Amendment violates Article I, Article V, and the First and Fourteenth Amendments of the United States Constitution, but granted her motion to dismiss appellee's claim that § 21 of the Missouri Amendment violates the Supremacy Clause of the United States Constitution. *See id.*, 996 F. Supp. 901 (W.D. Mo. 1998) (*Gralike II*). In its final order in this case, the district court granted appellee's motion for summary judgment on his Article I, Article V, and First Amendment Claims; the district court did not reach plaintiff-appellee's Due Process vagueness claim because it determined that the other three claims were sufficient to dispose of the case. *See id.*, 996 F. Supp. 917 (W.D. Mo. 1998) (*Gralike III*). The district court, in *Gralike III*, relied upon its earlier order in *Gralike II* for the analysis supporting its decision to grant summary judgment for plaintiff-appellee. Judgment was entered for appellee, and appellant timely appealed.

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[4]The District Court cited *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 108-09 (1990) (discussing the Missouri Supreme Court's order in *Zeman v. V.F. Factory Outlet, Inc.*, No. 72613 (Mo. July 13, 1990) (refusing to accept questions certified by federal courts)). *See Gralike v. Cook*, 996 F. Supp. 889, 901 (W.D. Mo. 1998) (*Gralike I*).

II. DISCUSSION

We review decisions to grant summary judgment de novo, reviewing the facts in the light most favorable to the non-moving party. *See Barnhart v. UNUM Life Insurance Co. of America*, No. 98-3350, Slip Op. at 7 (8th Cir. May 28, 1999). We will affirm a grant of summary judgment if, viewed in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See, e.g., Hughes v. Ortho Pharmaceutical Corp.*, No. 98-2218, Slip Op. at 4-5 (8th Cir. May 27, 1999).

A. FIRST AMENDMENT

Appellant argues that the district court erred in holding that the Missouri Amendment violates the First Amendment guarantee of free speech. First, she argues that, because the Missouri Amendment imposes no sanction on candidates for United States Congress for failure to speak, the district court erred in concluding that the Missouri Amendment compels or coerces candidates to speak. Second, she argues that the district court should not have analyzed the Missouri Amendment under strict scrutiny review, but rather should have balanced candidates' right to keep their views on term limits secret with the electorate's right to know the views of candidates. Furthermore, she points out, the Amendment was the result of a popular election, and the courts should be especially careful when considering legislation passed by direct democracy. We agree with the district court's well-reasoned analysis, and reject appellant's arguments.

1. Compelled Speech

It is well established that the First Amendment to the United States Constitution bars not only state action which restricts free expression but also state action which compels individuals to speak or express a certain point of view. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (*Wooley*); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (*Barnette*); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)

(*Miami Herald*); *cf. Scope Pictures v. City of Kansas City*, 140 F.3d 1201 (8th Cir. 1998); *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995). Moreover, "[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in the public context." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). We hold that the Missouri Amendment is an impermissible attempt by the State of Missouri to compel candidates to express a point of view on term limits. *Accord Barker v. Letellier*, 3 F. Supp. 1088, 1096 (D.S.D. 1998) (*Barker*) (invalidating a nearly identical term limit initiative passed in South Dakota on First Amendment grounds, in part); *Simpson v. Cenarrusa*, 944 P.2d 1372, 1375-76 (Idaho 1997) (*Simpson*) (invalidating similar term limit initiative in Idaho on First Amendment grounds, among other grounds).

In *Wooley*, the Supreme Court invalidated the conviction of a New Hampshire couple who covered the state motto "Live Free or Die" on their license plate, concluding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714; *see also Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Since *Wooley*, the Supreme Court has reaffirmed the prohibition on compelled speech and refined it to apply to cases in which the government orders certain types of speech or speech about certain topics. For example, in *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 786 (1988), the Court invalidated on First Amendment grounds a North Carolina law which, among other things, required professional fund raisers, before soliciting donations, to disclose what portion of donations they turned over to the charities for which they solicited in the preceding twelve months. The Court concluded that the state law violated the First Amendment prohibition on state-compelled speech because "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it . . . . To this end, the government . . .

may not substitute its judgment as to how best to speak for that of speakers and listeners . . . ." *Id.* at 790-91; *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 14-16 (1986) (*Pacific Gas*) ("the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold . . . . [T]he choice to speak includes within it the choice of what not to say . . . .").

The Missouri Amendment compels candidates to speak about term limits. First, it attempts to force candidates to speak in favor of term limits by threatening them with the ballot label if they fail to do so. Second, if a candidate refuses to speak in favor of term limits, the label on the ballot forces him or her to speak in opposition to the Amendment by noting that he or she failed to follow the voters' wishes. Either way, the Missouri Amendment does not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak. First, the Missouri Amendment selects the topic for public debate: term limits. Second, it chooses an approved position: favoring term limits. Third, it provides the actual words which non-incumbent candidates shall speak: the pledge. Finally, in the event its attempts to compel speech in favor of term limits fail, the Missouri Amendment provides a mechanism to compel candidates to speak in opposition: the ballot labels.

Appellant attempts to distinguish the Missouri Amendment from other compelled speech cases by arguing that the Missouri Amendment does not compel speech because it imposes no criminal or monetary sanction for refusing to speak. Rather, the only possible sanction the Missouri Amendment could impose, appellant argues, is the exposure of candidates' views and/or record on term limits. We disagree. As a threshold matter, we note that the concept of compelled speech has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction. *See, e.g., Miami Herald*, 418 U.S. at 258 ("Even if a newspaper would face no additional costs to comply . . . the Florida statute ([compelling speech] fails to clear the barriers of the First Amendment . . . ."). Nevertheless,

we believe that the Missouri Amendment in fact threatens a penalty that is serious enough to compel candidates to speak--the potential political damage of the ballot labels. *See Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999) (*Moore*); *accord Barker*, 3 F. Supp. 2d at 1094-95.

Contrary to appellant's contentions that the labels only provide information about the candidates' views, the labels do far more than advise voters of a candidates' opposition to term limits.[5] The labels are phrased in such a way they are likely to give (and we believe calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. *See Moore*, 169 F.3d at 1125; *accord Barker*, 3 F. Supp. 2d at 1094-95; *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52, 59-61 (D.Me. 1997) (*Gwadosky*); *Donovan v. Priest*, 326 Ark. 353, 370 (Ark. 1996) (*Donovan*); *Morrissey v. State*, 951 P.2d 911, 916 (Colo. 1998) (*Morrissey*). The non-incumbent label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," in light of the preamble and § 16 of the Amendment which state that the people of Missouri desire term limits, indicates that a candidate so labeled refused to promise to do the people's bidding. The incumbent label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" indicates that, during the preceding term, the candidate failed to act in accordance with his or her constituents' wishes. Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress.

The pejorative nature of the labels is heightened by the fact that there are no labels for candidates who take the pledge or comply with the mandates of § 17 while in office. The only "information" the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires.

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[5]Thus the question of whether the label is damaging does not turn so much on the impact of voter reaction to the fact that a candidate opposes or supports term limits, as appellant suggests, but more so on the language in the label that advises the voters of the candidate's purported opposition.

Furthermore, the labels are particularly harmful because they appear on the ballot, an official document produced by the state.[6] Thus, the labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that § 17 requires. *Moore*, 169 F.3d at 1125 ("[the] ballot labels effectively place the state's official stamp of disapproval on . . . [candidates] whom the state disfavors because of their views on a single political issue . . ."; *accord Barker*, 3 F. Supp. 2d at 1094, *Gwadosky*, 966 F. Supp. at 61; *Donovan*, 326 Ark. at 370 ("[the labels] are equivalent to an officially sanctioned recommendation by the State . . . not to vote for such candidates because they disregarded the instructions and wishes of the voters."). The ballot labels are a serious sanction, which we believe is sufficient to coerce candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot. Moreover, the fact that the label appears on the ballot compels candidates to speak because the labels themselves constitute speech. Once the label is on the ballot, it ascribes a point of view to the labeled candidate.

Arguing that the First Amendment does not insulate candidates from the electorate, appellant points out that individuals become subject to the Missouri Amendment only if they chose to run for office. However, "[a] political candidate does not lose the protection of the First Amendment when he [or she] declares himself [or herself] for public office." *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). An individual's choice to serve the public by seeking congressional office does not grant the state license to restrict or compel his or her speech. On the contrary, speech restrictions are particularly destructive in the political arena, where the importance of free exchange of ideas and information--a vital aspect of our democratic system--is at its zenith. *See id.* Furthermore, "[t]he identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas*, 475 U.S.

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[6]Moreover, the labels appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label.

at 8. Thus we reject appellee's suggestion that candidates for public office are afforded diminished First Amendment protections.

2. Application of Strict Scrutiny

Appellant also argues that the district court erred in applying strict scrutiny analysis to determine the constitutionality of the Missouri Amendment. She contends that instead the district court should have applied a "balancing test" and upheld the Amendment since the electorate's right to know candidates' views on term limits outweighs that of candidates to remain silent on the issue. Appellee's Brief at 19 (hereinafter "App. Br."). We disagree.

The District Court correctly determined that the Missouri Amendment is subject to strict scrutiny review. First, as discussed above, the Amendment burdens candidates' right to free expression by compelling them to state or act in such a way as to portray a position on the § 16 term limits proposal. This is an impermissible restriction on core political speech, which subjects the Amendment to strict scrutiny review. *See Meyer v. Grant*, 486 U.S. 414, 425 (1988). However, even assuming for purposes of analysis that the Missouri Amendment did not compel political speech, strict scrutiny review is warranted because the Amendment is a content-based, viewpoint-specific restriction on candidates' right to free speech. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (*Burson*) ("[A] facially content-based restriction on political speech in a public forum . . . must be subjected to exacting scrutiny); *see also Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994).

The Missouri Amendment is content-based because it addresses the issue of term limits, completely ignoring all other issues. In addition, it is content-based because it compels candidates to speak about the issue of term limits, which they might not do absent state action. *See Riley*, 487 U.S. at 795 (state mandate of "speech that the speaker would not otherwise make necessarily alters the content of the speech"). Furthermore, the Missouri Amendment is viewpoint-specific because the labeling provisions single out individual candidates for punishment based

only on their opposition-actual or ascribed-to term limits.[7] The Missouri Amendment only labels those who, according to the Secretary of State, oppose the Amendment's term limits proposal, and does nothing to those who pledge to support it. As such, the Missouri Amendment is a state-imposed, viewpoint specific restriction on candidates' speech which triggers strict scrutiny review. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("The general principle that has emerged . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-36 (1980); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)).

We hold that the district court correctly determined that the Missouri Amendment should be subject to strict scrutiny review.[8]

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[7]The point of view the labels ascribe to candidates may not even be accurate. The Missouri Amendment assigns a label to non-incumbents who fail to pledge and to incumbents who fail to do one of the seven enumerated actions, regardless of whether the candidates in fact oppose term limits. For example, a candidate who believed that terms should be limited to 12 years in the House rather than the six years the Amendment requires would receive the label even though he or she actually supports term limits in general. An incumbent candidate who supports term limits but failed to vote for a proposed amendment because it was linked to unfavorable legislation, for instance, could also be labeled on the ballot. Regardless of a candidate's opinion about term limits in general, if the candidate does not support the specific limit prescribed by the Missouri Amendment or if he or she does not see it fit to pursue the amendment process at any cost, he or she will be branded as an opponent to the Missouri Amendment and to the wishes of the voters of Missouri. Such ascriptions of viewpoint are precisely the type of state-imposed speech from which individuals are protected by the First Amendment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977).

[8]Appellant urges us to determine the appropriate level of scrutiny by applying the Supreme Court's reasoning in *Burdick v. Takushi*, 504 U.S. 428 (1992) (*Burdick*). *Burdick* was a voting rights case brought by an individual voter challenging Hawaii's absolute ban on write-in voting. The plaintiff alleged that the ban violated his First and Fourteenth Amendment rights. The Court advocated

To survive strict scrutiny review, appellant must prove that the Missouri Amendment is narrowly tailored to achieve a compelling government interest. *See Burson*, 505 U.S. at 198 ("The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'") (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 36, 45 (1983)); *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996); *see also Riley*, 487 U.S. at 801 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Appellant maintains that the Missouri Amendment ensures the electorate's right to know candidates' views. We construe this to mean that voter education is the compelling state interest the Missouri Amendment is meant to achieve. While we agree that an informed electorate is important in our democratic system of government, we hold that the Missouri Amendment fails strict scrutiny review because it is not narrowly tailored to achieve the goal of voter education. First, the Missouri Amendment only provides information about candidates views on term limits, neglecting every other issue. Although the voters of Missouri obviously feel strongly about term limits, we believe that a state measure that informs voters only of candidates' views on term limits does not ensure an informed electorate. Second, the

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an inquiry into the degree of state interference with First and Fourteenth Amendment rights to determine the level of scrutiny to apply, stating that state election regulations which severely restrict those rights must be narrowly tailored to achieve a compelling state interest but that regulations that impose only "reasonable, non-discriminatory restrictions" are generally justified with important state interests. *See id.* at 434.

Although the present case differs from *Burdick* in significant regards, we believe that applying the *Burdick* test also mandates strict scrutiny. The Missouri Amendment is not a reasonable, nondiscriminatory restriction on candidates' First and Fourteenth Amendment rights, rather it is a content-based and viewpoint-specific interference with candidates' right to free speech. As such, *Burdick* would require a narrowly tailored regulation to achieve a compelling state interest.

Missouri Amendment is not narrowly tailored to achieve even the more limited goal of informing voters of candidates' views on term limits, because it can falsely identify candidates. For example, the Amendment could require the placement of a ballot label next to the name of a term limits supporter who failed to comply with an aspect of § 17(2). *See also* supra note 7. Finally, there are less restrictive means to promote voter education, which indicates that the Missouri Amendment is not narrowly tailored. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988). For example, Missouri could institute voluntary programs, such as debates or voter information guides, to provide information about candidates' views on term limits and other important issues. Such programs advance the State's interest in informing voters without compelling candidates to speak or restricting their right not to speak.

Since appellant failed to prove that the labeling provisions of the Missouri Amendment are narrowly tailored to achieve a compelling state interest, she has failed to justify its infringement on candidates' right to free speech. The label provisions of the Missouri Amendment are barred by the First Amendment as applicable to the states through the Fourteenth Amendment.

B. SPEECH AND DEBATE CLAUSE[9]

A related issue, which applies more appropriately to incumbent candidates, is whether the Missouri Amendment violates Article I, Section 6, Clause 1 of the United States Constitution--the

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[9]Although the district court did not address this issue, we believe it is necessary to demonstrate why the Missouri Amendment is invalid as applied to incumbent candidates. Since the situation of incumbent candidates is somewhat different than that of non-incumbent candidates, the First Amendment issues discussed in Section IIA do not apply as squarely to incumbent candidates. As such we exercise our discretion to affirm the judgment on this ground, although it was not considered by the district court. *See United States v. Sager*, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984) ("We review judgments, not opinions, and we may affirm on any ground supported by the record, whether or not that ground was urged below or passed on by the district court."); *see also Wisdom v. First Midwest Bank*, 167 F.3d 402, 406 (8th Cir. 1999) (quoting *Stevens v. Redwing*, 146 F.3d 538, 543 (8th Cir. 1998)).

Speech and Debate Clause, which states, in relevant part: ". . . for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The Missouri Amendment contravenes this guarantee because it establishes a regime in which a state officer--the secretary of state--is permitted to judge and punish members of Congress for their legislative actions or positions. *Accord Barker*, 3 F. Supp. at 1096; *Simpson*, 944 P.2d at 1375.

The Missouri Amendment specifically vests in the Secretary of State of Missouri the responsibility to determine when the ballot label shall appear next to the name of an incumbent candidate. *See* MO. CONST. Art. VIII, § 19. In so doing, she is to accept and consider public comments. *See id.* at § 19(3). As we discussed above, the ballot label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" is a pejorative label with politically damaging ramifications, which amounts to punishment. Thus, the Missouri Amendment establishes a system by which Senators and Representatives are questioned about and can be punished for speech, debate, and actions in Congress. This system contradicts the protections of the Speech and Debate clause, which is intended to allow Senators and Representatives to speak and vote their conscience without fear of retribution. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats . . . that directly impinge upon or threaten the legislative process.").

The portions of the Missouri Amendment dealing with labeling incumbent candidates based on their legislative speech and actions violate the Speech and Debate clause. *Accord Barker*, 3 F. Supp. at 1096; *Simpson*, 944 P.2d at 1375.

C. QUALIFICATIONS CLAUSE

Appellant next contends that the district court erred in concluding that the Missouri Amendment constitutes an impermissible qualification for candidacy for the United States

Congress in violation of the Qualifications Clause, Article I of the United States Constitution. Appellant argues that the Missouri Amendment does no more than provide information about candidates and does not constitute a qualification within the meaning of Article I. We disagree.

We believe that Qualifications Clause issues raised in this case were addressed by the Supreme Court in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). In that case the Court held that an amendment to the Arkansas Constitution, which banned the names of incumbents who had served more than two terms in the United States Senate or three terms in the United States House of Representatives from appearing on the ballot, established an impermissible additional qualification for candidacy for Congress. *See id.* at 829-30. After conducting a thorough historical review, the Court determined that neither the Framers, the constructs of our democratic society, the text of the Constitution itself, nor past Congressional action supported the contention that states may impose additional or different qualifications than those set out in the Qualifications Clause. *See id.* at 827. Rather, the Court stated, any state authority to set qualifications for Congress was abrogated by the ratification of the Constitution, and the sole source of qualifications for Congressional office is contained in Article I. *See id.* at 801. Thus, any attempt by a state to alter or add to these qualifications is clearly proscribed by the Constitution. [10]

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[10]In *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (*U.S. Term Limits*) the Supreme Court pointed out, there is unanimity among courts which have considered whether states can add to or change Article I qualifications. The Court cited a litany of cases which struck state-initiated attempts to alter Article I qualifications:

> *Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *Eckwall v. Stadelman*, 146 Ore. 439, 446, 30 P.2d 1037, 1040 (1934); *Stockton v. McFarland*, 56 Ariz. 138, 144, 106 P.2d 328, 330 (1940); *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948); *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (D. N. M. 1972); *Stack v. Adams*, 315 F. Supp. 1295, 1297-1298 (N.D.Fla. 1970); *Buckingham v. State*, 42 Del. 405, 35 A.2d 903, 905 (1944); *Stumpf v. Lau*, 108 Nev. 826, 830, 839 P.2d 120, 123 (1992); *Danielson v. Fitzsimmons*, 232 Minn. 149, 151, 44 N.W.2d 484, 486 (1950); *In re Opinion of Judges*, 79 S.D. 585, 587, 116 N.W.2d 233, 234 (1962). Courts have struck down state-imposed qualifications in the form of term limits, *see, e.g., Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994); *Stumpf v. Lau*, 108 Nev. at 830, 839 P.2d at 123, district residency requirements, *see, e.g., Hellmann v. Collier*, 217 Md. 93, 100, 141 A.2d 908, 911 (1958); *Dillon v. Fiorina*, 340 F. Supp. at 731; *Exon v. Tiemann*, 279, F. Supp. 609, 613 (Neb. 1968); *State ex rel. Chavez v. Evans*, 79 N.M. 578, 581, 446 P.2d 445, 448 (1968) (per curiam), loyalty oath requirements, *see, e.g., Shub v. Simpson*, 196 Md. 177, 199, 76 A.2d 332, 341, *appeal dism'd*, 340 U.S. 881 (1950); *In re O'Connor*, 173 Misc. 419, 421, 17 N.Y.S.2d 758, 760 (super. Ct. 1940), [**34] and restrictions on those convicted of felonies, *see, e.g., Application of Ferguson*, 57 Misc. 2d 1041, 1043, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968); *Danielson v. Fitzsimmons*, 232 Minn. at 151, 44 N.W.2d at 486; *State ex rel. Eaton v. Schmahl*, 140 Minn. 219, 220, 167 N.W. 481 (1918) (per curiam).
>
> *U.S. Term Limits*, 514 U.S. at 798-99.

Furthermore, the Court found that indirect attempts to modify Congressional qualifications were equally infirm. Although the Arkansas Amendment did not prohibit incumbents from service in Congress, the Court rejected the petitioner's contention that the Arkansas Amendment did not impose an impermissible qualification because incumbents could still be elected as write-in candidates. *See id.* at 830-31. The Court determined that states cannot achieve by indirect means what is constitutionally prohibited by direct means. *See id.* at 829. To identify impermissible indirect attempts to alter qualifications for Congress, the Court devised a two-part test: "[]a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836.

The Missouri Amendment fails *U.S. Term Limit*'s test. First, the Amendment specifically targets a distinct class of candidates--those who oppose term limits, refuse to take the term

limits pledge, or fail to do one or more of the actions prescribed by the Amendment while serving in Congress. This class of candidates is singled out on the ballot with the damaging labels. The label provisions will have the likely effect of coercing candidates to support the term limits mandate or removing candidates who fail to do so by persuading voters not to elect them. As we discussed above, the ballot labels cast doubt on labeled candidates' ability to represent constituents, since the labels state that labeled candidates ignore their constituents' wishes. As such, the Missouri Amendment is likely to handicap labeled candidates' ability to be elected.

Second, as discussed above, the Missouri Amendment has the sole, expressed purpose of adding the qualification to congressional service that candidates must have served fewer than three terms in the House or two terms in the Senate. Sections 15 and 16 of the Missouri Amendment state that the people of Missouri seek to limit the number of terms of service in Congress to three in the House and two in the Senate. To attain this goal, the Missouri Amendment requires members of the Missouri congressional delegation to pursue the Article V amendment process, and it enforces this mandate with the threat of the ballot labels. *See* MO. CONST. Art. VIII, § 17. Thus, adding the term limit qualification is the sole purpose of the Missouri Amendment. The fact that the Missouri Amendment seeks to do so by compelling members of Congress from Missouri to initiate, pursue, and support the Article V amendment process does not change the analysis under *U.S. Term Limits*, as it is still an indirect attempt to add a qualification to those listed in the Qualifications Clause. Since the Missouri Amendment seeks to impose an additional qualification for candidacy for Congress and does so in a manner which is highly likely to handicap term limit opponents and other

labeled candidates, it fails the *U.S. Term Limits* test.[11] *See* 504 U.S. at 829.

D. ARTICLE V

Lastly, appellant argues that the district court erred in holding that the Missouri Amendment violates Article V of the United States Constitution, which sets out the process through which the Constitution may be amended. She contends that the Missouri Amendment does not alter the Article V process. We disagree.

Article V of the United States Constitution sets forth the two processes through which the United States Constitution may be amended. Article V states in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments

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[11]Appellant attempts to demonstrate that the Supreme Court has rejected Qualifications Clause challenges to State election practices, citing *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (*Tashjian*). However, appellant's attempts to draw parallels between *Tashjian* and the Missouri Amendment fail. *Tashjian* dealt with the effect of the Qualifications Clause on the qualification of independent voters to participate in the Connecticut Republican Party's primary. The Court stated that the Framers sought to prevent the disqualification of state voters from *voting* in federal elections through the Qualifications Clause. *See id.* at 228.

Appellant would have us extend *Tashjian* to allow state-imposed qualifications as long as they do not disqualify state residents from *running for* Congress; we decline to do so. *Tashjian* dealt with the issue of qualification to participate in the political process as voters. The Supreme Court held that the qualifications clause did not demand symmetrical qualifications for voters in state and federal elections. The Missouri Amendment, however, does not deal with the qualification of Missouri voters to vote in federal elections, but their qualification as candidates in the election.

Furthermore, appellant's citation to *Tashjian* to support the argument that only direct disqualifications violate the Qualifications Clause has already been rejected by the Supreme Court in *U.S. Term Limits v. Thornton*. *U.S. Term Limits*, 514 U.S. at 829.

> to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. Art. V. Article V specifically delegates the amendment process to legislative bodies, not the voters.

Supreme Court precedent supports the conclusion that the people have a limited, third-party role in the amendment process. In invalidating an Ohio constitutional amendment which required ratification of the Eighteenth Amendment by popular referendum, the Court held that the ratification of a constitutional amendment was a federal function derived from Article V, which delineates the sole methods for ratification. *See Hawke v. Smith*, 253 U.S. 221, 230 (1920). In *Leser v. Garnett*, 258 U.S. 130, 137 (1922), the Court held that the ratification of the Nineteenth Amendment was not subject to state-imposed restrictions on the amendment process. The Court again determined that state legislatures ratifying constitutional amendments assume a federal function, which "transcends any limitations sought to be imposed by the people of a State." *Id.* Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions.

More recently, two state courts were confronted with voter-initiated attempts to direct the Article V amendment process. The Supreme Courts of California and Montana invalidated, on Article V grounds, voter initiatives that compelled the California and Montana State legislatures to apply to Congress to call a constitutional convention to consider a balanced budget amendment. *See AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984) (*Eu*); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984)

(*Waltermire*). In each case, the initiative required State legislators to continue in session without pay if they did not pass the necessary petitions within a specified period. Both courts determined that such voter-imposed restrictions on legislators' ability to deliberate the issues independently violated Article V. *See Eu*, 686 P.2d at 706; *Waltermire*, 691 P.2d at 830.

Appellant maintains that Article V does not prohibit the electorate from directing elected officials to amend the Constitution. He relies principally on *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), to support this contention. In that case then-Justice Rehnquist, sitting as Circuit Justice, denied an injunction against a non-binding referendum in Nevada about the Equal Rights Amendment. Justice Rehnquist reasoned that the referendum did not alter the Article V process because it only served to advise legislators of the people's wishes and legislators were free to disregard it. *See id.* at 1388.

However, the Missouri Amendment is far more than an advisory, non-binding show of voters' opinion on term limits. *See, e.g., Moore*, 169 F.3d at 1124; *Barker*, 3 F. Supp. 2d at 1093; *Gwadosky*, 966 F. Supp. at 57; *Donovan*, 931 S.W.2d at 367; *Petition No. 364*, 930 P.2d at 192-93. *But see Simpson*, 944 P.2d at 613 (holding that without the ballot labels, the term limit initiative is non-binding and thus permissible under *Kimble*). By its own terms, the Missouri Amendment requires Senators and Representatives from Missouri to initiate and support the Article V process: "We, the Voters of Missouri, hereby *instruct* each member of our congressional delegation to use all of his or her delegated powers to pass the Congressional Term Limits Amendment." MO. CONST. Art. VIII, § 17(1) (emphasis added); *see also Moore*, 169 F.3d at 1124 (interpreting Nebraska term limits initiative to bind members of Congress to "'proceed on a precise and inflexible course of action'") (quoting *Morrissey*, 951 P.2d at 916). Furthermore, the Missouri Amendment seeks to coerce members of Congress to comply with this mandate by threatening them with the politically-damaging ballot labels if they fail to do so. Thus, unlike the Nevada legislators in *Kimble*, members of Missouri's congressional delegation are not free to disregard the instruction

embodied in the Amendment. *See, e.g., Moore*, 169 F.3d at 1124; *Barker*, 3 F. Supp. 2d at 1093; *Gwadosky*, 966 F. Supp. at 57; *Donovan*, 931 S.W.2d at 367; *Petition No. 364*, 930 P.2d at 192-93. *But see Simpson*, 944 P.2d at 613.

We cannot accept appellant's argument that the Missouri Amendment does not alter the Article V process. Voter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V. As discussed above, the Missouri Amendment's ballot labels constitute such an attempt by the voters to directly influence the Article V process by directing Senators and Representatives from Missouri to support and pursue the proposal and ratification of a term limits amendment to the United States Constitution.

III. CONCLUSION

The record, viewed in the light most favorable to appellant, reveals no genuine issue of material fact and that appellee is entitled to judgment as a matter of law because the Missouri Amendment violates the First Amendment, the Speech and Debate Clause, the Qualifications Clause, and Article V of the United States Constitution. [12]

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[12] Judge Hansen dissents from our decision to strike the Missouri Amendment in its entirety and argues that, instead, we should sever §§ 17-19 and leave the remainder of the Amendment intact. If we followed Judge Hansen's recommendation, Article VIII of the Missouri Constitution would state that the people of Missouri seek to amend the United States Constitution by adding a term limit qualification for Congressional service. Although there would no longer be a State-imposed punishment for candidates who fail to support the proposed term limit, the Missouri Constitution would still contain: (a) a direct attempt by the people to amend the U.S. Constitution and (b) an attempt by the State and people of Missouri to add a qualification to Article I. Because we believe that both these attempts are unconstitutional, we cannot follow Judge Hansen's suggestion, notwithstanding this court's decision in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999).

First, as we noted in Part IID, the people are not to play a direct role in the Article V amendment process. While we agree with Judge Hansen that advisory communication between the people and their elected officials is

Accordingly, we affirm the judgment of the district court.

HANSEN, Circuit Judge, concurring in part and dissenting in part.

I readily concur with Part I of the opinion of the court and those portions of Part II which declare the labeling provisions (§§ 17, 18, and 19) of the Missouri Amendment to be in violation of the Constitution. I write separately, however, specifically to assert my view that §§ 15 and 16 of the Missouri Amendment are severable pursuant to § 22 of the Amendment and are not independently unconstitutional under the court's reasoning in Part II. Because I believe §§ 15 and 16 remain legitimate political expressions of the citizens of Missouri, I must respectfully dissent

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permitted, we believe that the Missouri Amendment constitutes more than such merely advisory communications, and, as such, is barred by Article V. Assuming for the purposes of analysis that a Circuit Justice opinion for the Ninth Circuit is binding precedent in the Eighth Circuit, we believe that *Kimble* is distinguishable. The referendum in *Kimble* was initiated by the Nevada Legislature and specifically stated that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." 439 U.S. at 1386 (quoting 1977 Nev. Stats., ch. 174, §§ 3, 5). If the Missouri Amendment contained similar language, we would agree with Judge Hansen that it is not coercive. However, in the absence of such language, we believe that the memorialization in the Missouri Constitution of the people's intent to pass a specific amendment to the United States Constitution departs from the expressly advisory, non-binding referendum then-Justice Rehnquist found to be permissible in *Kimble* and comes closer to the direct involvement the Supreme Court disallowed in *Lesser* and *Hawke*. *See* Part IID, above.

Second, as we noted in Part IIC, states cannot constitutionally add to or alter the qualifications for federal office. *See* U.S. Const. Art. I. Thus, §§ 15 and 16 are arguably barred by Article I because they are an attempt by a state to add to or change the qualifications for service in the United States Congress--as opposed to an Article V petition for a Constitutional convention from a state legislature to consider amending the United States Constitution.

Finally, we refuse to sever the Missouri Amendment on jurisprudential grounds, because if we choose to sever §§ 17-19, we must also sever portions of § 16 which are unconstitutional or superfluous in the absence of §§ 17-19. Such micro-management of the Missouri Constitution would entangle this court too much in state law issues. As such, we opt to abstain from such action.

from that portion of the court's opinion and judgment which sweeps away the entirety of the Missouri Amendment.

In *Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999), this court recently held, while striking down several sections of a similar Nebraska term limits amendment, that the section declaring the official position of the citizens of Nebraska to be that their elected officials should enact a term limits amendment was severable and constitutional. The principle established in *Miller v. Moore* is equally applicable to the Missouri amendment at issue in this case. Standing alone, §§ 15 and 16 are a legitimate, nonbinding form of political expression by the citizens of Missouri explaining their support for a specific term limits amendment to the United States Constitution.

The opinion of the court suggests that §§ 15 and 16 standing alone violate Article V and Article I of the federal Constitution because they are, respectively, "a direct attempt by the people to amend the U.S. Constitution" and "an attempt by the State and people of Missouri to add a qualification to Article I." *See supra* at 24 n.12. With respect to the latter, I believe the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I. Once §§ 17 through 19 are struck down, §§ 15 and 16 do not in any way add to or alter the current qualifications for Missouri's congressional delegation, nor do they affect in any way federal election procedures. Furthermore, § 15 could not be more explicit when it states that the purpose of the voter-approved initiative is to "lead to the adoption of the following U.S. Constitutional Amendment." Therefore, I see nothing unconstitutional about these efforts (§§ 15 and 16) by the people of Missouri to secure an amendment to Article I through the Article V process, and nothing in the decision in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), suggests otherwise.

With respect to Article V, the "people" (that is, the citizenry) have more than "a limited, third party role in the amendment process." *See supra* at 21. In fact, "We the People"

have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment *procedures* set out in Article V. However, the people play a crucial, *substantive* role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures. Standing alone, §§ 15 and 16 are nothing more than the people of the State of Missouri exercising their political right to petition their elected representatives to enact a term limits amendment to the Constitution. The only "coercion" involved in this form of political expression is ordinary garden-variety political pressure, which certainly is not prohibited by the Constitution. Nothing in §§ 15 and 16 restricts the formal amendment procedures of Article V, and thus they should not be held to violate the Constitution.

I know of no precedent that prohibits the people of a state from expressing their political views through amendments to their state constitution, even if that expression involves matters of interest to or under the control of federal legislators, so long as the amendment is advisory and does not coerce elected officials into acting in a certain way. *See Kimble v. Swackhamer*, 439 U.S. 1385, 1387-88 (1978) (Rehnquist, Circuit Justice). The court's opinion attempts to distinguish the principle in *Kimble* by arguing that the Missouri Amendment contains no specific language making it clear that it does not bind representatives. Whether the Amendment specifically states that it is nonbinding or not, the effect is the same--it is nonbinding. Once the labeling provisions found in §§ 17 through 19 are struck down, there are no longer any improper penalties imposed on elected officials and there is no longer an enforcement mechanism other than through the basic political process. It is true that §§ 15 and 16 still may be politically persuasive because they represent the views of a majority of the voters who voted on the issue. Because §§ 15 and 16 standing alone are not binding, however, they are not unconstitutional and should be allowed to stand as a democratically

determined expression of the political will of the people of Missouri.

Finally, I see no reason why upholding §§ 15 and 16 is improper federal court micro-management of the Missouri Constitution. At most, the last clause of § 16 may be superfluous, but superfluity does not equal unconstitutionality. Nothing remaining in § 16 is unconstitutional, and I think the entire section could remain without severing any part of it. Furthermore, out of respect for the people of Missouri and their Missouri Constitution, I believe we become less entangled in state law issues by striking down only those portions of the Missouri Amendment that are clearly unconstitutional.

Accordingly, I respectfully dissent from that portion of the court's opinion that strikes down §§ 15 and 16 of the Missouri Amendment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
v.
REBECCA MCDOWELL COOK,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Donald James Gralike brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Missouri Secretary of State Rebecca McDowell Cook in her official capacity. Plaintiff seeks to enjoin defendant from implementing and enforcing a recent amendment to Article VIII of the Missouri Constitution. The Amendment to Article VIII directs members of the United States Congress from Missouri to use their delegated powers to pass a Congressional Term Limits Amendment to the United States Constitution. The Amendment also requires candidates for United States Congress to either support the congressional term limits amendment or have words stating that they failed to support the amendment placed by their names on the ballot.

On January 15, 1997, I entered an order granting in part and denying in part defendant's first Motion to Dismiss on standing, sovereign immunity and abstention grounds. In that order, I granted defendant's motion as to plaintiff's claim that the amendments to Article VIII violated Article III of the Missouri Constitution but denied defendant's motion as to the remainder of plaintiff's claims.

On January 29, 1998, I entered an order granting in part and denying in part defendant's "Motion to Dismiss for Failure to State a Claim." In that order, I granted defendant's motion as to plaintiff's claim that a jurisdictional provision of Article VIII violates the Supremacy Clause, but denied defendant's motion as to the remainder of plaintiff's claims.

Plaintiff's remaining claims are as follows: In Count I of the Complaint, plaintiff claims that Article VIII, as amended, places impermissible additional qualifications on candidates for United States Congress in violation of Article I of the United States Constitution. In Count II, plaintiff claims that Article VIII is unconstitutionally vague. In Count III, plaintiff claims that Article VIII violates his First Amendment right to free speech. Finally, in Count V, plaintiff claims that Article VIII violates Article V of the United States Constitution.

Now, plaintiff moves for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

I. SUMMARY JUDGMENT STANDARD

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); *Inland Oil & Transp. Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir. 1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581

F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 2553.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the *absence* of genuine issues of material fact. However, the moving party *is not required* to support its motion with affidavits or other similar materials *negating* the opponent's claim. *Id.* (emphasis added).

The nonmoving party then must go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 248, 106 S. Ct. 2505, 2510 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a

verdict for that party. *Anderson*, 106 S. Ct. at 2511. Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

II. UNDISPUTED FACTS

During the November 1996 general election, the Missouri voters passed by majority vote a ballot initiative to amend Article VIII of the Missouri Constitution. The Amendment added Sections 15-22 (hereinafter collectively referred to as the Article VIII Amendment) which are intended to promote the passage of a federal constitutional amendment setting term limits for members of the United States Congress. *See* Article VIII, § 15.

Section 16 contains a proposed amendment to the United States Constitution that would limit the number of terms that one individual can serve as United States Senator or Representative.

Section 17(1) directs each member of the Missouri delegation to Congress to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in section 16]." Section 17(2) requires that each Missouri Senator or Representative who fails to support the term limits amendment in one of several enumerated ways shall have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" placed adjacent to that person's name on the primary and general election ballots.

For non-incumbent candidates for Congress, Section 18 requires that they be given an opportunity to take a "Term Limits" pledge each time they file to run for congressional office. For those who decline to make the pledge, Section 18(1) requires that the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed next to their names on the primary and general election ballots.

The Secretary of State must decide whether words stating failure to support term limits should be placed next to a candidate's name. § 19. In making that determination, the Secretary must consider timely submitted public comments. § 19(2). The Secretary must declare within five days after the filing deadline whether the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be placed next to a candidate's name. § 19(4). After the Secretary makes that determination, subsections 19(5) - (6) give an aggrieved "elector" or "candidate" the opportunity to appeal the Secretary's decision to the Missouri Supreme Court. On appeal, an aggrieved "candidate" has the burden to prove by clear and convincing evidence that the Secretary erred by placing a designation next to his or her name. On the other hand, if an aggrieved "elector" appeals the Secretary's decision not to place the words stating lack of support for term limits next to a candidate's name, the Secretary has the burden to prove by clear and convincing evidence that the candidate met the requirements to avoid having the words placed next to the candidate's name.

Section 20 provides for automatic repeal of Sections 15-22 if the Congressional Term Limits Amendment becomes part of the United States Constitution. Section 21 provides that "[a]ny legal challenge to this Amendment shall be filed as an original action before the Supreme Court of [Missouri]." Finally, Section 22 provides for severability if any portion of the amendment is declared invalid or unconstitutional.

Plaintiff Donald Gralike is a resident of Missouri's Third Congressional District. He is more than 25 years of age. He has been a United States citizen for more than seven years and is a taxpayer and registered voter in Missouri. Gralike was a candidate for United States Representative for the Third Congressional District of Missouri in 1976. He is currently considering announcing his candidacy for that position in the 1998 election. Under Missouri law, Gralike may not formally file a declaration of candidacy until February 1998. Plaintiff has stated that he is not inclined to take the pledge described in Section 18 of Article VIII. Plaintiff has also stated that he understands that his failure to take

the pledge could lead to his having words stating that he has failed to support term limits placed next to his name on the election ballot.

III. DISCUSSION AND ANALYSIS

A. Plaintiff's Arguments that He is Entitled to Summary Judgment on His Claims that the Article VIII Amendment Violates Articles I and V of the United States Constitution and the First Amendment Right to Free Speech

In the January 29, 1998, order, I denied defendant's motion for judgment on the pleadings on plaintiff's claims in Counts I, III and V of his Complaint.

In Part III.A. of the January 29, 1998, order, I concluded that plaintiff had stated a claim that the Article VIII Amendment, on its face, has the sole purpose of creating additional qualifications for Congress indirectly and has the likely effect of handicapping a class of candidates for Congress. Because plaintiff had stated a claim that the Amendment violates Article I, I denied defendant's motion for judgment on the pleadings.

In Part III.B. of the January 29, 1998, order, I concluded that plaintiff has stated a claim that the Article VIII Amendment infringes on a candidate's protected First Amendment right to free speech and that the Amendment is not narrowly tailored to promote a compelling state interest. Therefore, I concluded that plaintiff had stated a claim that the Article VIII Amendment violates the First Amendment.

In Part III.E. of the January 29, 1998, order, I concluded that plaintiff has stated a claim that the Article VIII Amendment violates Article V of the United States Constitution by attempting to give power to the citizens of Missouri that the Constitution reserves to Congress and state legislative bodies.

In each of Counts I, III, and V of his Complaint, plaintiff alleges that the Amendment is unconstitutional on its face. Defendant concedes that "the issues presented by plaintiff are purely legal issues." Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment at 6.

Because there are no factual issues, the legal issues could have been resolved as a matter of law on cross-motions for judgment on the pleadings. However, plaintiff did not file a motion for judgment on the pleadings or seek any relief in his opposition to defendant's motion. Therefore, due to the procedural posture of the case when ruling on defendant's motion for judgment on the pleadings, I was only able to conclude plaintiff had stated a claim for relief. Had plaintiff filed a motion for judgment on the pleadings, based on the legal analyses that I conducted in the January 29, 1998, order, I would have concluded that the Article VIII Amendment violates Articles I and V of the United States Constitution and the First Amendment to the United States Constitution.

Now that the plaintiff has filed a Motion for Summary Judgment, I must follow the analysis appropriate for a motion under Rule 56, Federal Rules of Civil Procedure.

Because plaintiff's claims in Counts I, III, and V depend only on the constitutionality of the Amendment on its face, and because defendant concedes that there are no issues of material fact pertaining to the claims in Counts I, III and V, plaintiff has shown that there are no genuine issues of material fact for trial. Therefore, the issues raised by plaintiff are legal and can be resolved based on the briefs filed in connection with defendant's Motion for Judgment on the Pleadings and in connection with plaintiff's Motion for Summary Judgment.

For the reasons stated in Parts III.A., III.B., and III.E. of the January 29, 1998, order, I concluded that plaintiff had stated claims upon which relief could be granted on Counts I, III and V. Because defendant concedes there are no factual issues pertaining to the claims asserted in Counts I, III and V, and because defendant

has added no legal argument conflicting with the conclusions reached in the January 29, 1998, order, plaintiff has established that he is entitled to judgment as a matter of law on Counts I, III, and V. Specifically, plaintiff has established that Sections 15, 16, 17, 18, and 19 of Article VIII violate Articles I and V of the United States Constitution and the First Amendment to the United States Constitution.

As an alternative analytical approach to reach the same conclusion, plaintiff has established that he is entitled to judgment as a matter of law on Counts I, III and V for the reasons stated in Parts IIIA, IIIB, and IIIE of the January 29, 1998, order.

Because there are no issues of fact precluding judgment as a matter of law, plaintiff's Motion for Summary Judgment on Counts I, III, and V of his Complaint will be granted. Defendant will be permanently enjoined from implementing and enforcing Sections 15, 16, 17, 18, and 19 of Article VIII to the Missouri Constitution.

B. Plaintiff's Argument that He is Entitled to Summary Judgment on His Claim that the Article VIII Amendment Is Unconstitutionally Vague and Overbroad

In the January 29, 1998, order, I denied defendant's Motion for Judgment on the Pleadings on plaintiff's claim in Count II of his Complaint because I concluded that plaintiff had alleged facts in his Complaint sufficient to state a claim that the Article VIII Amendment is unconstitutionally vague and overbroad.

Because I have already concluded that plaintiff is entitled to summary judgment on Counts I, III, and V of the Complaint, it is not necessary to consider whether he is also entitled to summary judgment on Count II. Plaintiff would not be entitled to any additional relief if I were to determine that he is also entitled to summary judgment on Count II.

IV. CONCLUSION

Accordingly, it is ORDERED that:

1) Plaintiff's Motion for Summary Judgment (Doc. No. 59) is granted; and

2) defendant is permanently enjoined from implementing and enforcing Sections 15, 16, 17, 18, or 19 of Article VIII of the Missouri Constitution.

/s/D. Brook Bartlett
D. Brook Bartlett
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
February 18, 1998

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
v.
REBECCA MCDOWELL COOK,
Defendant.

ORDER GRANTING "DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM" AS TO COUNT IV OF PLAINTIFF'S FIRST AMENDED COMPLAINT AND DENYING "DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM" AS TO COUNTS I, II, III AND V OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Donald James Gralike brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Missouri Secretary of State Rebecca McDowell Cook in her official capacity. Plaintiff seeks to enjoin defendant from implementing and enforcing a recent amendment to Article VIII of the Missouri Constitution. The Amendment to Article VIII directs members of the United States Congress from Missouri to use their delegated powers to pass a Congressional Term Limits Amendment to the United States Constitution. The Amendment also requires candidates for United States Congress to either support the congressional term limits amendment or have words stating that they failed to support the amendment placed by their names on the ballot.

In Count I of the Complaint, plaintiff claims that Article VIII, as amended, places impermissible additional qualifications on

candidates for United States Congress in violation of Article I of the United States Constitution. In Count II, plaintiff claims that Article VIII is unconstitutionally vague. In Count III, plaintiff claims that Article VIII violates his First Amendment right to free speech. In Count IV, plaintiff claims that a jurisdictional provision of Article VIII violates the Supremacy Clause. Finally, in Count V, plaintiff claims that Article VIII violates Article V of the United States Constitution.

On January 15, 1997, I entered an order granting in part and denying in part defendant's first Motion to Dismiss on standing, sovereign immunity and abstention grounds. In that order, I granted defendant's motion as to plaintiff's claim that the Amendment to Article VIII violates Article III of the Missouri Constitution but denied defendant's motion as to the remainder of plaintiff's claims.

Now, defendant moves to dismiss Plaintiff's First Amended Complaint under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted.

I. BACKGROUND

During the November 1996 general election, the Missouri voters passed by majority vote a ballot initiative to amend Article VIII of the Missouri Constitution. The Amendment added Sections 15-22 (hereinafter collectively referred to as the Article VIII Amendment) which are intended to promote the passage of a federal constitutional amendment setting term limits for members of the United States Congress. *See* Article VIII, § 15.

Section 16 contains a proposed amendment to the United States Constitution that would limit the number of terms that one individual can serve as United States Senator or Representative.

Section 17(1) directs each member of the Missouri delegation to Congress to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in section 16]." Section 17(2) requires that each Missouri Senator or

Representative who fails to support the term limits amendment in one of several enumerated ways shall have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" placed adjacent to that person's name on the primary and general election ballots.

For non-incumbent candidates for Congress, Section 18 requires that they be given an opportunity to take a "Term Limits" pledge each time they file to run for congressional office. For those who decline to make the pledge, Section 18(1) requires that the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed next to their names on the primary and general election ballots.

The Secretary of State must decide whether words stating failure to support term limits should be placed next to a candidate's name. § 19. In making that determination, the Secretary must consider timely submitted public comments. § 19(2). The Secretary must declare within five days after the filing deadline whether the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be placed next to a candidate's name. § 19(4). After the Secretary makes that determination, subsections 19(5) - (6) give an aggrieved "elector" or "candidate" the opportunity to appeal the Secretary's decision to the Missouri Supreme Court. On appeal, an aggrieved "candidate" has the burden to prove by clear and convincing evidence that the Secretary erred by placing a designation next to his or her name. On the other hand, if an aggrieved "elector" appeals the Secretary's decision not to place the words stating lack of support for term limits next to a candidate's name, the Secretary has the burden to prove by clear and convincing evidence that the candidate met the requirements to avoid having the words placed next to the candidate's name.

Section 20 provides for automatic repeal of Sections 15-22 if the Congressional Term Limits Amendment becomes part of the United State Constitution. Section 21 provides that "[a]ny legal challenge to this Amendment shall be filed as an original action before the Supreme Court of [Missouri]." Finally, Section 22

provides for severability if any portion of the Amendment is declared invalid or unconstitutional.

Plaintiff Donald Gralike is a resident of Missouri's Third Congressional District. He is more than 25 years of age. He has been a United States citizen for more than seven years and is a taxpayer and registered voter in Missouri. Gralike was a candidate for United States Representative for the Third Congressional District of Missouri in 1976. He is currently considering announcing his candidacy for that position in the 1998 election. Under Missouri law, Gralike may not formally file a declaration of candidacy until February 1998.

II. STANDARD FOR MOTION TO DISMISS

Because defendant filed an answer in this case before filing her motion to dismiss, this is technically a motion for a judgment on the pleadings under Rule 12(c), Federal Rules of Civil Procedure. However, Rule 12(c) motions are evaluated using the same standard as motions under Rule 12(b), Federal Rules of Civil Procedure. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

In ruling on a motion to dismiss, it is the court's obligation to accept as true all factual allegations in the Complaint and all inferences that reasonably may be drawn from those facts and to construe the Complaint in the light most favorable to the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 1848-49 (1984)). A complaint should not be dismissed for failure to state a claim for relief unless it appears beyond a doubt that the plaintiff can prove no facts that would entitled [sic] plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957).

III. ANALYSIS

A. Defendant's Argument that She is Entitled to Judgment on the Pleadings on Plaintiff's Claim that the Article VIII Amendment Violates Article I of the United States Constitution

In Count I of plaintiff's First Amended Complaint, plaintiff alleges that the Article VIII Amendment violates Article I of the United States Constitution by imposing qualifications for candidacy for United States Congress in addition to those enumerated in Article I. Complaint ¶¶ 33-36.

Defendant claims that plaintiff has failed to state a claim for relief in Count I because the Article VIII Amendment does not impose any impermissible additional qualifications for candidates for Congress and is a valid exercise of power under Article I, § 4, cl. 1 (the Elections Clause).

The Supreme Court most recently examined state authority to regulate federal congressional elections in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799, 115 S. Ct. 1842 (1995). The plaintiff in *U.S. Term Limits* challenged an amendment to the Arkansas Constitution that precluded persons who had already served more than a specified number of terms in Congress from having their names placed on the ballot. *Id.* at 1845-46.

A majority of the Supreme Court in *U.S. Term Limits* held that states do not have the power to "supplement the exclusive qualifications set forth in the text of the Constitution." *Id.* at 1866. Those "exclusive qualifications" include the age, citizenship, and residency requirements set forth in Article I, §§ 2-3. *Id.* at 1947; *see also id.* n.2 (discussing several additional constitutional provisions arguably setting "qualifications" for Congress). The Court held that the provision in the Arkansas Amendment prohibiting multiple-term incumbents' names from being placed on the ballot was an attempt to impose indirectly an impermissible additional qualification. Therefore, the provision violated Article I. *Id.* at 1871. In announcing its holding, the Court stated that "a

state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 1871.

Defendant offers two arguments why the Amendment to Art. VIII does not violate Article I as construed in *U.S. Term Limits*. First, defendant claims that to violate Article I, a state requirement must contain an "outright disqualification" that categorically bars a specific class of potential candidates from having their names placed on the ballot. Defendant's Suggestions at 11-13. Defendant argues that the Article VIII Amendment does not prohibit any candidate from having his or her name on the ballot, regardless of the candidate's position on term limits, and, therefore, it is not an "outright disqualification."

Defendant's argument that only "outright disqualifications" from eligibility or access to the ballot violate Article I lacks merit. The Court's decision in *U.S. Term Limits* was not based on the conclusion that the subject restriction amounted to an outright disqualification of a class of candidates. Instead, the Supreme Court held that any attempt to indirectly add qualifications for congressional office by making it more difficult for a class of candidates to be elected violates Article I. *See id.* at 1867-68.

In *U.S. Term Limits*, the defendant claimed that the Arkansas Amendment did not constitute an impermissible added qualification because it did not disqualify the long-term incumbents from service in Congress but rather merely kept their names from appearing on the ballot. *U.S. Term Limits*, 115 S. Ct. at 1866-67. Thus, the defendant argued, long-term incumbents could still run as write-in candidates and serve in office if elected. *Id.* The Supreme Court rejected that argument, stating: "In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand." *Id.* at 1868. Similarly, here, the fact that the Article VIII Amendment does not disqualify a class of candidates from having their names placed on the ballot--but rather disadvantages a class of candidates--makes the Amendment suspect under the reasoning in *U.S. Term Limits*.

Defendant's second argument is that the Article VIII Amendment is constitutional under the Court's holding in *U.S. Term Limits*. Defendant argues that plaintiff has failed to allege facts in his complaint sufficient to satisfy both elements of the Court's holding that "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." Defendant's suggestions at 13-14. Defendant argues that under *U.S. Term Limits*, a plaintiff must show that the state amendment violates both the purpose and effect elements in order to establish that the state amendment is unconstitutional. *Id.*

1. The Article VIII Amendment Has the Sole Purpose of Creating Additional Qualifications Indirectly

The sole purpose of the Article VIII Amendment is apparent from the wording of the Amendment. The stated purpose of the Article VIII Amendment is set forth in the Preamble: "The people of Missouri hereby state our intention that this initiative lead to the adoption of the following U.S. Constitutional Amendment [set forth in § 16]." Mo. Const. Art. VIII, § 15. Each provision of the Amendment is designed to accomplish this purpose. The approach taken to obtain adoption of a term limits amendment is to make support for a term limits amendment a qualification for congressional office. Candidates for Congress are required to state their position on term limits. If a candidate fails to support term limits then the Secretary must place words so stating next to the candidate's name on the ballot. Thus, the Article VIII Amendment is an attempt to add indirectly a new qualification for the offices of United States Senator and Representative from Missouri, i.e., support of term limits.

Defendant argues that the Amendment is a valid exercise of state power under the Elections Clause, which provides that "[t]he Time, Places and Manner of Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof." U.S. Const. Art. I, § 4, cl. 1. Defendant argues that the Article VIII Amendment has a proper purpose under

Article I because the Amendment ensures the disclosure of important candidate information to voters. Defendant's Reply at 2.

States have authority under the Elections Clause to implement procedural regulations aimed at "maintain[ing] the integrity of the political process." *U.S. Term Limits*, 115 S. Ct. at 1869-70.

In holding the Arkansas Amendment unconstitutional in *U.S. Term Limits*, the Court distinguished between procedural regulations that are valid under the Elections Clause, and substantive qualifications that violate Article I. A state's procedural regulations are valid under the Elections Clause when they serve "the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in congress." *Id.* at 1870. The Court concluded that the sole purpose of the Arkansas Amendment at issue in *U.S. Term Limits* "was to limit the terms of elected officials," and, therefore, it was not a valid exercise of power under the Elections Clause. *Id.* at 1871.

In this case, the undisputed purpose of the Missouri Amendment is to encourage congressional delegates to adopt a constitutional term limits amendment, not to ensure that voters are fully informed about the candidates. Significantly, defendant has not argued--nor could she in light of the statement in the preamble to the contrary--that voter education was the ultimate purpose behind the Article VIII Amendment. Even if one of the purposes of the Amendment is to ensure that Missouri voters are aware of a candidate's position on term limits, that purpose is not independent of an attempt to impose an additional qualification on candidates for Congress. Therefore, like the statute at issue in *U.S. Term Limits*, plaintiff stated a claim that the Article VIII Amendment has the sole purpose of creating indirectly an additional qualification for United States Congress.

2. The Article VIII Amendment Has the Likely Effect of Handicapping a Class of Candidates

Defendant argues that plaintiff has failed to show that the Amendment has the "likely effect of handicapping a class of candidates" because plaintiff has failed to demonstrate how having the words stating lack of support for term limits placed next to his name on the ballot would hurt plaintiff's chances of being elected. Defendant acknowledges that plaintiff alleges in his Complaint that he believes that having the words stating lack of support for them next to his name will hurt his chances of being elected. However, defendant argues that "plaintiff's pleading alone does not establish that Missouri Article VIII will 'have the likely effect of handicapping a class of candidates.'" Defendant's Suggestions at 14.

Presumably, defendant is arguing that whether a state amendment has the "likely effect of handicapping a class of candidates" is a question of fact that cannot be resolved based on the pleadings alone. However, for the purposes of a motion for judgment on the pleadings, the factual allegations in the pleadings must be accepted as true. Moreover, defendant's argument runs counter to defendant's assertion that"[t]he issues before the Court are issues of law." Defendant's Reply at 1.

The approach taken by the Supreme Court in *U.S. Term Limits* suggests that the question whether a state provision has the "likely effect of handicapping a class of candidates" is not a question of fact. In coming to the conclusion that the Arkansas Amendment had the likely effect of handicapping long-term incumbents, the majority expressly refused to rely on evidence that a write-in candidate had a slim chance of success. *U.S. Term Limits*, 115 S. Ct. at 1871; *see also U.S. Term Limits*, 115 S. Ct. 1910-11 & n.40 (Thomas, J., dissenting) (noting that it would have been improper for the majority to have relied on any binding factual determinations made by the Arkansas trial court on issues of disputed fact in ruling cross-motions for summary judgment).

Therefore, it is not necessary to have a factfinder decide as a factual matter whether the challenged state law will seriously harm a specific candidate's chances of winning the election. The question whether a state amendment has the likely effect of handicapping a class of candidates is a question of law for the

Court. The question is simply whether the Missouri Amendment is likely to put a class of candidates at a disadvantage as compared to other candidates.

There can be little dispute that the Missouri Amendment singles out an identifiable class of candidates for special treatment. Only those non-incumbent candidates who refuse to take the "Term Limits Pledge" and those incumbent candidates who the Secretary of State determines have failed to act in favor of term limits as required by the Amendment will have words stating failure to support term limits placed next to their names on the ballot. Candidates who agree to take the pledge or who maintain a record on the term limits issue that satisfies the Secretary will not have the informative words placed next to their names on the ballot.

The next question is whether the Amendment is likely to disadvantage the class of candidates that will have the informative words placed next to their names. As discussed previously in this opinion, the Amendment was adopted by the voters and is intended to obtain the support of Missouri congressional delegation for a term limits amendment. The voters, by adopting the Amendment, sought to identify all congressional candidates who do not support term limits. In light of the purpose of the Amendment, the only intended effect of placing the words next to a name on the ballot is to disadvantage the candidate in the eyes of term limits supporters in the electorate.

Further, the words stating lack of support for term limits are the only issue-specific information that can appear next to any candidate's name. The words are printed in capital letters. Significantly, the language used is pejorative. Both "DISREGARDED VOTERS' INSTRUCTIONS" and "DECLINED TO PLEDGE" carry negative connotations that suggest that the candidate has done something wrong and imply official state disapproval of those candidates branded with a designation.

States have the authority under the Elections Clause to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process." *U.S. Term*

Limits, 115 S. Ct. at 1842 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9, 103 S. Ct. 1564, 1570 n.9 (1983). States may impose procedural regulations intended to eliminate voter confusion and to promote candidate disclosure by candidates. *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S. Ct. 533 (1986); *Storer v. Brown*, 415 U.S. 780, 103 S. Ct. 1564 (1974)). Even if one could persuasively argue that the Amendment was intended to eliminate voter confusion and to promote candid disclosure (which it was not), the Article VIII Amendment is not evenhanded. Only those candidates who refuse to support term limits are singled out and branded with a conspicuous and negative statement next to their names. Therefore, plaintiff has stated a claim that the Article VIII Amendment is likely to handicap those candidates who refuse to decline to support term limits.

In drawing a distinction between what a state may and may not do consistent with the Elections Clause, the Supreme Court in *U.S. Term Limits* stated that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits*, 115 S. Ct. at 1869. The undisputed intent of the Missouri Amendment is to influence the outcome of voting on any proposed term limits amendment by favoring the class of candidates who support the term limits amendment set forth in the Amendment to Article VIII. Plaintiff has stated a claim that this attempt to influence the outcome of federal elections by disfavoring the class of candidates who refuse to support the term limits amendment set forth in Article VIII violates Article I and exceeds the power granted to states under the Elections Clause to regulate the time, place, and manner of federal elections. Therefore, defendant's motion for judgment on the pleadings on plaintiff's claim that the Amendment violates Article I of the United States Constitution will be denied.

B. Defendant's Claim that She is Entitled to Judgment on the Pleadings on Plaintiff's Claim that the Article VIII Amendment Violates the First Amendment Right to Free Speech

Plaintiff argues that the Article VIII Amendment infringes on plaintiff's freedom of expression by attempting to compel a candidate to take a specific position in favor of term limits and by limiting the candidate's ability to fully express the candidate's views on term limits. *See* Plaintiff's Response at 23-26. Plaintiff claims that the Amendment restricts a candidate's ability to fully express the candidate's views on term limits by requiring the candidate to take a simple yes or no position on term limits without permitting an explanation.

Defendant argues that the Article VIII Amendment does not violate the First Amendment right against compelled speech because running for office is a voluntary act and because a candidate does not face any criminal penalties for failing to speak in favor of term limits.

1. The Article VIII Amendment Infringes on Plaintiff's Protected First Amendment Rights

The First Amendment, made applicable to the states through the Fourteenth Amendment, prohibits a state from making any law "abridging the freedom of speech." *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 1891 (1988) (quoting U.S. Const. Amend I). The First Amendment was "fashioned to assure the unfettered interchange of ideas for bringing about political and social changes desired by the people." *Id.* Therefore, the First Amendment offers its greatest protection for political speech and speech that involves matters of public concern. *Id.* at 1891-92 (citation omitted). Furthermore, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831 (1974) (holding that a state law requiring newspapers to publish the replies of political candidates whom they had criticized violated the First Amendment right to free press).

Candidates for political office are not afforded any less First Amendment protection than any other individual. *Brown v.*

Hartlage, 556 U.S. 45, 53, 102 S. Ct. 1523, 1524 (1982). In fact, the First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* Therefore, candidates must be afforded an "unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 1529.

The Supreme Court has held that the First Amendment protects candidates from state laws that "reduce the quantity of [a candidate's] expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S. Ct. 612, 634 (1976). Accordingly, the Court held that the First Amendment protects candidates from laws that restrict the amount of money a candidate can spend on political advertising during a campaign. *Id.* Similarly, a law that prohibited the payment of petition circulators infringed on "core political speech" by limiting the "number of voices" who could speak on a particular public issue, the hours they could speak, and the size of the audience they could reach. *Meyer*, 108 S. Ct. at 1892. Because the restriction had the effect of reducing the total quantum of speech on a particular public issue, it burdened important First Amendment rights. *Id.* at 1892-93.

Like the restrictions at issue in *Meyer* and *Buckley*, the term limits designation provisions of Article VIII burden a candidate's right to speak freely on the issue of term limits. The amendment limits a candidate's speech in several ways.

First, the Amendment punishes candidates for speaking out against term limits by requiring the Secretary of State to place negative words next to their names on the ballot. Thus, the Amendment interferes directly with a candidate's right to speak freely on a matter of public concern in the same way that criminal sanctions or fines would.

Second, like the laws at issue in *Wooley* and *Miami Herald*, the amendment compels candidates to speak on the term limits issue. Non-incumbent candidates are required to take the term limits pledge or face the penalty of having negative words placed next to their name on the ballot. Similarly, incumbent candidates must take affirmative action to show their support for term limits to avoid having the negative words placed next to their names on the ballot. The Amendment uses the threat of being disadvantaged in the election to coerce candidates into taking a position on the term limits issue. A state law infringes on protected First Amendment rights whether it compels an individual to speak by threatening criminal prosecution, *see, e.g., Wooley*, 97 S. Ct. at 1435, or rather simply requires an individual to speak as a condition precedent to engaging in an otherwise lawful activity, *see, e.g., Miami Herald*, 94 S. Ct. at 2839. Thus, the Amendment infringes on a candidate's right to refrain from speaking on an issue. Also, the Amendment attempts to coerce candidates into taking a specific position on the term limits issue. The Article VIII Amendment requires candidates to either speak in favor of the term limits amendment set forth in the Article VIII Amendment or face having the Secretary of State place negative wording next to the candidates' names on the ballot.

Further, a candidate for political office does not waive the candidate's First Amendment rights by running for office. The right against state-compelled speech does not lose its force just because affected individuals could voluntarily refrain from undertaking the activity that will subject them to the compelled speech. The plaintiff in *Wooley*, for example, could have refrained from owning a car to avoid having to display the state motto on his licence place, yet the Supreme Court still found unconstitutional a state law that penalized plaintiff for covering up the motto on his license place. *See Wooley*, 97 S. Ct. at 1434; *see also Miami Herald*, 94 S. Ct. at 2839 (holding that the right-of-access law infringed on protected First Amendment rights because it might discourage editors from engaging in the voluntary act of publishing controversial statements about candidates).

Therefore, plaintiff has stated a claim that the Amendment infringes on a candidate's protected First Amendment rights.

2. The Article VIII Amendment is Subject to Strict Scrutiny

Having concluded that plaintiff has stated a claim that the Article VIII Amendment infringes on the First Amendment rights of a candidate for Congress in Missouri, it is necessary to decide whether the State's interest in enforcing the Amendment is sufficiently compelling to outweigh the burden it places on candidates' speech. *Wooley*, 97 S. Ct. at 1436.

Defendant argues that a lower level of scrutiny should be applied in this case, one that "weighs the magnitude of the states' [sic] interest versus the extent of the burden imposed." Defendant's suggestions at 23 (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 107 S. Ct. 544, 548 (1986)). Defendant relies on the Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992), in which the Supreme Court held that when state laws impose only "reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* at 2063 (internal quotation marks omitted).

In *Burdick*, the Court concluded that Hawaii's prohibition on write-in voting was a "reasonable, nondiscriminatory restriction." *Id.* at 2063-66 (finding that "there is nothing content-based about a flat ban on all forms of write-in ballots").

State laws that restrict speech based on its content are subject to strict scrutiny. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 2459 (1994). "[A]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of their ideas or views expressed are content-based." *Turner Broadcasting*, 114 S. Ct. at 2459.

Here, in stark contrast to the situation in *Burdick*, the Article VIII Amendment, on its face, favors a particular viewpoint

on term limits and penalizes candidates who fail to support term limits. As a content-based restriction on speech, the Amendment is subject to strict scrutiny.

Defendant next argues that even if strict scrutiny is applied, the Article VIII Amendment does not violate the First Amendment because Missouri has a compelling interest in "promoting an informed electorate." Defendant's Suggestions at 24. According to defendant, the words stating failure to support term limits perform a function similar to the placement of party labels next to a candidate's name on the ballot: they provide a "shorthand designation" for each candidate's view on term limits. *Id.* at 25; *see Tashjian*, 107 S. Ct. at 551-52 (recognizing the legitimate state interest in fostering an informed and educated electorate).

Even assuming that a state has a compelling interest in promoting an informed electorate, the approach taken by the State of Missouri in the Article VIII Amendment cannot withstand strict scrutiny. First, as discussed earlier in this opinion, the ultimate purpose of the Article VIII Amendment is to encourage the passage of a term limits amendment. The ultimate purpose of the Amendment belies the state's argument that the Amendment was intended merely to keep voters informed about a candidate's position on term limits. Even recognizing that voter education is a compelling state interest, the Amendment does not appear to be intended or fashioned to attain that goal.

Moreover, even if it is assumed that the Article VIII Amendment does in fact provide voters with more information than they would have in the absence of the Amendment, the Amendment is not narrowly tailored to further the state's interest in educating voters. The position of all candidates on term limits is not put on the ballot. The electorate is told only about the position of those candidates who do not support term limits. Furthermore, the words placed next to certain candidates' names on the ballots tell voters only that those candidates refused to support the specific term limits amendment set forth in Section 16, and they do so in a negative, biased manner. The state may not single out and stigmatize a class of candidates under the guise of

educating the voters. Plaintiff has stated a claim that the Amendment is not narrowly tailored to accomplish a compelling state interest and thus fails to survive strict scrutiny review. Accordingly, defendant's motion for judgment on the pleadings on plaintiff's First Amendment challenge will be denied.

C. Defendant's Motion for Judgment on the Pleadings on Plaintiff's Claim the Article VIII Amendment Is Unconstitutionally Vague and Overbroad

1. The Article VIII Amendment is Unconstitutionally Vague

Plaintiff argues that the Amendment is unconstitutionally vague because the requirements set forth in Sections 17 and 18 and the enforcement mechanisms set forth in Section 19 are confusing and unclear. Plaintiff argues that if the Amendment goes into effect, Missouri Senators and Representatives will face situations in which they do not know how to conform their conduct to the Amendment's requirements. In addition, plaintiff claims that the Amendment grants too much discretion to the Secretary of State to decide whether to place words next to a candidate's name stating that the candidate failed to support term limits without providing sufficient direction about how the Secretary of State should exercise the discretion.

Defendant argues that even if the provisions of Article VIII that relate to incumbent candidates are ambiguous, the Amendment is clear as to plaintiff and other non-incumbent candidates: "if [plaintiff] wishes to avoid the designation [that he does not support term limits]; he must take the pledge." Defendant's Suggestions at 18. Defendant has not addressed whether the Amendment is vague as it applies to incumbent candidates.

To demonstrate that a law is unconstitutionally vague on its face, a plaintiff must show that the law is impermissibly vague in all of its applications. *Village of Hoffman Estates*, 102 S. Ct. at 1193. Therefore, if defendant is correct that the Amendment is not unconstitutionally vague as applied to Gralike and other non-incumbents, plaintiff's vagueness arguments will fail.

However, defendant's argument lacks merit because any ambiguities in the Amendment apply to both incumbent and non-incumbent candidates. First, the enforcement mechanisms in Section 19 apply equally to both incumbent and non-incumbent candidates. Thus, any ambiguities in Section 19 apply to both incumbent and non-incumbent candidates. Second, non-incumbents are affected by the affirmative requirements for incumbents listed in Section 17 because the term limits pledge in Section 18 requires non-incumbents to agree to abide by those requirements if elected. In taking the pledge, a candidate agrees to "use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS' will not appear adjacent to my name." Mo. Const. Art. VIII, § 18(3). Thus, non-incumbent candidates are also affected by any ambiguities in Section 17.

The Supreme Court has recognized several factors to be weighed in evaluating whether a law that is so vague that it violates due process. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 1193 (1982). A court should consider whether the law "trap[s] the innocent by not providing fair warning" about what conduct is lawful and what is not. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298 (1972)). The court should also assess whether the law "impermissibly delegates basic policy matters to [individuals] on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Id.* Finally, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 1193-94.

In articulating those factors, however, the Court warned that they should not "be mechanically applied." Instead, "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." *Id.* at 1193.

Here, an analysis of the first factor recognized by the Supreme Court in *Village of Hoffman Estates* weighs in favor of a conclusion that the Article VIII Amendment is unconstitutionally vague. The Amendment does not provide individuals of ordinary intelligence with sufficient guidance to know what conduct will subject them to having language stating failure to support term limits placed next to their names. For example, Section 17 does not inform a Senator or Representative what must be done in the event that a term limits amendment is proposed that is different than the one set forth in Section 16. Does the Amendment require a Missouri delegate to vote against any term limits legislation that differs in any significant way from the proposed amendment set forth in Section 16, or will failing to vote in favor of term limits legislation in any form subject a Senator or Representative to having the designation placed next to his or her name?

Analyzing the Article VIII Amendment in light of the second factor recognized by the Supreme Court in *Village of Hoffman Estates* also leads to the conclusion that the Amendment is void for vagueness. Section 19(1) states that the "Secretary of State shall be responsible for making an accurate determination as to whether a candidate" should have words stating failure to support term limits placed next to his or her name. However, Section 19 does not set forth any specific standards to guide the Secretary in making an "accurate determination." Section 19(2) requires the Secretary to "consider timely public comments prior to making the determination." However, Section 19 does not set forth what weight should be given to public comments. By delegating broad discretion to the Secretary of State without providing a sufficiently detailed set of guidelines for making the determination, the law "impermissibly delegates basic policy matters" to the Secretary.

In addition, any "elector" can appeal the Secretary's decision *not* to place words stating failure to support term limits next to a candidate's name. If this occurs, the burden is on the *Secretary* to prove by clear and convincing evidence that the candidate should not have words stating failure to support term limits placed next to the candidate's name. § 19(5). The term

"elector" is not defined. It is unclear who is intended to have the power under Section 19(5) to challenge the Secretary's decision not to place the negative words next to a candidate's name on the ballot. Section 19(5) delegates power to an undefined group to challenge the Secretary's decision.

Finally, the most important factor that the *Village of Hoffman Estates* Court recognized as affecting whether a law is unconstitutionally vague--whether the law threatens to inhibit the exercise of constitutional rights--also weighs against the constitutionality of the Amendment in this case based on the allegations in plaintiff's Complaint. Plaintiff stated a claim that the absence of clear standards governing decisionmaking by the Secretary of State and "electors" threatens to chill core political speech. Also, plaintiff has stated a claim that, in the absence of clear standards governing decisionmaking by the Secretary of State, candidates would be uncertain how to act to avoid facing the negative words placed next to their names on the ballot. Candidates, therefore, would be discouraged from candidly expressing their views on terms limits. The same vagueness about standards governing the Secretary of State's discretion could discourage potential candidates from running for office.

Therefore, plaintiff has stated facts in his Complaint sufficient to state a claim that the Article VIII Amendment is unconstitutionally vague.

Defendant has stated that the Secretary plans, at some point, to adopt implementing regulations that will clarify the ambiguities in the requirements and enforcement provisions of the Amendment. Laws containing ambiguous provisions are not void for vagueness if the ambiguities can be clarified through the adoption of administrative rules and regulations. *See Village of Hoffman Estates*, 102 S. Ct. at 1196. On the record before me, however, I cannot assume that regulations will be adopted. Furthermore, I cannot predict whether the regulations adopted will remedy the vagueness problems with the Amendment. Therefore, defendant's Motion to Dismiss Count II of plaintiff's Complaint will be denied.

2. The Article VIII Amendment Is Unconstitutionally Overbroad

To successfully challenge a law for facial overbreadth, a plaintiff must show that the law "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates*, 102 S. Ct. at 1191.

Having already concluded that plaintiff has stated a claim that the Article VIII Amendment impermissibly infringes on protected First Amendment rights and that the Amendment is not narrowly tailored to further a compelling state interest, and having concluded that under the facts alleged in the Complaint the Article VIII Amendment is unconstitutionally vague, it follows that plaintiff has stated a claim that the Article VIII Amendment reaches a substantial amount of constitutionally protected conduct. Therefore, plaintiff has stated a claim that the Article VIII Amendment is unconstitutionally overbroad.

D. Defendant's Motion for Judgment on the Pleadings on Plaintiff's Claim that the Jurisdictional Provision of Article VIII Violates the Supremacy Clause

Article VIII, Section 21 states: "Any legal challenge to this Amendment shall be filed as an original action before the Supreme Court of this State." Plaintiff claims that Section 21 violates the Supremacy Clause of the United States Constitution because it interferes with federal jurisdiction over federal constitutional challenges to the Article VIII Amendment. Plaintiff's Response at 29-30.

Defendant argues that the provision does not limit federal court jurisdiction but rather grants the Missouri Supreme Court original jurisdiction to hear a constitutional challenge to the Amendment. Defendant's Suggestions at 28. Defendant does not argue that this court lacks jurisdiction over this case based on Section 21.

Because defendant does not argue that Section 21 precludes federal jurisdiction in this case, it is not necessary to decide whether Section 21 would violate the Supremacy Clause if it were interpreted to preclude federal court jurisdiction over a federal constitutional challenge to the Article VIII Amendment. Therefore, I agree with defendant that there is no justiciable issue in this case whether Section 21 violates the Supremacy Clause.

Plaintiff argues that even though defendant has not raised the jurisdictional provision as a defense in this case, the issue whether Section 21 violates the Supremacy Clause is justiciable because it is "capable of repetition, yet evading review."

Plaintiff's argument lacks merit.

For an issue to be justiciable because it is "capable of repetition, yet evading review," despite the fact that the plaintiff lacks a concrete interest in the outcome, two circumstances must be present. "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Lewis v. Continental Bank Corp.* 494 U.S. 472, 110 S. Ct. 1249, 1255 (1990) (internal quotations and citations omitted).

Here, neither of the two circumstances is present. If plaintiff were to bring another case in federal court challenging the constitutionality of the Article VIII Amendment and the defendant raises the defense that Section 21 precludes a federal court from hearing a federal constitutional challenge to the Article VIII Amendment, the federal court would have an adequate opportunity to resolve the issue at that time. Furthermore, plaintiff will either prevail in this case in having the Amendment declared unconstitutional, or he will not prevail, in which case any future attempts by plaintiff to challenge the constitutionality of the Amendment would be barred by either res judicata or collateral estoppel. Therefore, it is not likely that plaintiff will ever face again any issue involving the effect of Section 21 on federal

jurisdiction. Accordingly, defendant's motion for judgment on the pleadings will be granted on Count IV of the Complaint.

E. Defendant's Motion for Judgment on the Pleadings on Plaintiff's Claim that Article VIII Violates Article V of the United States Constitution

Plaintiff claims that the Article VIII Amendment violates the requirement in Article V of the United States Constitution that all proposed constitutional amendments come from Congress or from the state legislatures. Plaintiff argues that the Amendment "is an improper attempt by state citizens to control the federal constitutional amendment process." Plaintiff's Response at 32.

Defendant argues that the Amendment is merely intended to bring the issue of term limits before Congress, and is not an attempt by Missouri voters to propose and ratify constitutional amendments in a manner that is not allowed under Article V. Defendant argues that the Article VIII Amendment does not violate Article V because a candidate does not face any adverse consequences for failing to support the proposed term limits amendment.

Article V of the United States Constitution provides:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .

In *Hawke v. Smith*, 253 U.S. 221, 40 S. Ct. 495 (1920), the Court struck down a provision of the Ohio Constitution that allowed Ohio voters to ratify a proposed constitutional amendment by referendum. The Court stated:

> The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred by Congress, and is limited to two methods, by action of the Legislatures of three-fourths of the states or conventions in a like number of states. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

Hawke, 40 S. Ct. at 497 (internal citation omitted).

Two years later, in *Leser v. Garnett*, 258 U.S. 130, 42 S. Ct. 217 (1922), the Supreme Court revisited the issue of a state's power to alter the specific procedures for ratification set forth in Article V. In *Leser*, following the ratification of the Nineteenth Amendment, several registered voters moved to have the names of female voters stricken from the list of registered voters. *Id.* at 217. The plaintiffs argued that the state legislatures lacked power to ratify a federal constitutional amendment that would be invalid under their own state constitutions. In rejecting the plaintiffs' claims, the Court reaffirmed its holding in *Hawke* that the power to ratify a proposed constitutional amendment is a federal power that "transcends any limitations sought to be imposed by the people of a state." *Id.* at 218.

Several lower courts have held unconstitutional state ballot measures intended to indirectly alter the ratification procedures set

forth in Article V. *See State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984) (holding that a state provision violated Article V where the provision directed the state legislature to submit an application to Congress to propose a balanced-budget amendment and provided that if the legislators failed to make the application within 90 days, they would remain in session without pay until they made the application); *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984) (holding that a state provision violated Article V where the provision required that state legislators either make an application to Congress to propose a balanced-budget amendment or lose their salaries). The courts in *Harper* and *Eu* relied on the Supreme Court's holdings in *Hawke* and *Leser* that Article V empowered state legislative bodies--and not the electorate of a state in general--to propose and ratify constitutional amendments. Consequently, they reasoned, the framers of Article V contemplated that the decisions to propose or ratify a constitutional amendment be made through the "deliberative process[es]" in which legislators are "free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise." *Harper*, 691 P.2d at 828; *Eu*, 686 P.2d at 613.

Applying this same reasoning, two other courts that have struck down state provisions nearly identical to the Article VIII Amendment on Article V grounds. *See League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 53-55, 63 (D.Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119, 122-24, 128 (Ark. 1996), *cert. denied sub nom. Arkansas v. Donovan*, 117 S. Ct. 1081 (1997). Both courts held that a referendum passed by the voters of a state which is intended to coerce state and federal elected officials into proposing or ratifying a term limits amendment to the Constitution violates Article V. *Gwadosky*, 966 F. Supp. at 59-61; *Donovan*, 931 S.W.2d at 128. As the *Gwadosky* court stated: "A citizen's role is outside the Article V process. The citizen votes to elect the state's federal and state lawmakers. These elected officials, in turn, through a deliberative and independent process, propose and ratify constitutional amendments when this becomes necessary." *Gwadosky*, 966 F. Supp. at 59-61.

Both the *Gwadosky* and *Donovan* courts held that provisions requiring ballot labels for candidates who failed to support term limits would have an impermissibly coercive impact on state and federal legislators. The threat of having negative words placed next to a legislator's name in the next election would place an undue influence on the legislator to vote in favor of term limits rather than exercise his or her own independent judgment as is contemplated by Article V of the United States Constitution. *Gwadosky*, 966 F. Supp. at 60; *Donovan*, 931 S.W.2d at 128.

In this case, I am persuaded by the decisions of United States District Court for the District of Maine and the Arkansas Supreme Court that the Article VIII Amendment violates Article V. Article V gives authority to Congress and to state legislative bodies, not to the citizens of the states, to propose constitutional amendments. On its face, the Missouri Amendment is intended to "lead to the adoption of the . . . U.S. Constitutional Amendment [in § 16]." The attempt by the people of Missouri to use the threat of negative ballot designations to "encourage" their congressional delegates to propose a term limits amendment violates Article V because it interferes with the independent judgment of state legislators or convention delegates that is contemplated by Article V. Because the Amendment is an attempt by Missouri citizens to do indirectly what Article V prohibits them from doing directly, plaintiff has stated a claim that the Amendments to Article VIII are unconstitutional under Article V of the United States Constitution.

Defendant's argument that a candidate does not face any adverse consequences for failing to support the proposed term limits amendment is not persuasive. The express intent of the Amendment is "that the initiative lead to the adoption of the [term limits amendment]." § 15. Like the nearly identical labels at issue in the *Gwadosky* case, the phrases that the Amendment requires the Secretary to place next to the name of each candidate who fails to support term limits "are explicitly, and this Court believes effectively, targeted to persuade voters that all candidates so labeled are unworthy of public office. They are intentionally intimidating." *Gwadosky*, 966 F. Supp. at 60.

Defendant also argues that plaintiff lacks standing to attack the Article VIII Amendment on Article V grounds because plaintiff is not an incumbent candidate. Defendant's Suggestions at 29.

Section 18 requires non-incumbents to take a "Term Limits" pledge in which each candidate states: "If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." To avoid the negative designation, a non-incumbent must pledge before the election to refrain from exercising his independent judgment on the term limits issue once elected. Therefore, I do not find persuasive defendant's argument that plaintiff lacks standing to raise the Article V issue.

Accordingly, defendant's Motion for Judgment on the Pleadings on Count V will be denied.

V. CONCLUSION

This case is before the Court on defendant's Motion for Judgment on the Pleadings. After reviewing the issues presented in light of the pleadings in this case, many of plaintiff's challenges to the Article VIII Amendment appear to be based on a legal, not factual, basis. In light of conclusions reached in this opinion, plaintiff appears likely to prevail on the merits of several of his legal arguments. Because of the legal nature of many of the issues raised by defendant, a reader of this opinion might be misled by the language used that I am ruling on the merits. My intent is to rule only on the issues raised by defendant involving whether a claim or claims have been stated by the plaintiff. Any ruling on the merits must await further developments in this case.

Accordingly, it is ORDERED that:

1) on Count IV of plaintiff's First Amended Complaint, defendant's Motion for Judgment on the Pleadings (Doc. No. 45) is granted; and

2) on Counts I, II, III, and V, defendant's Motion for Judgment on the Pleadings is denied.

/s/D. Brook Bartlett
D. Brook Bartlett
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
January 29, 1998

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
v.
REBECCA MCDOWELL COOK,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Plaintiff Donald James Gralike brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Missouri Secretary of State Rebecca McDowell Cook in her official capacity. Plaintiff seeks to enjoin defendant from implementing and enforcing a recent amendment to Article VIII of the Missouri Constitution. The Amendment to Article VIII directs members of the United States Congress from Missouri to use their delegated powers to pass a Congressional Term Limits Amendment to the United States Constitution. The Amendment also requires candidates for United States Congress to either support the congressional term limits amendment or have words stating that they failed to support the amendment placed by their names on the ballot.

In Count I of the Complaint, plaintiff claims that Article VIII, as amended, places impermissible additional qualifications on candidates for United States Congress in violation of Article I of the United States Constitution. In Count II, plaintiff claims that Article VIII, as amended, is unconstitutionally vague. In Count III, plaintiff claims that Article VIII, as amended, violates his First Amendment right to free speech. In Count IV, plaintiff claims that

a jurisdictional provision of Article VIII, as amended, violates the Supremacy Clause. In Count V, plaintiff claims that Article VIII, as amended, violates Article V of the United States Constitution. Finally, in Count VI, plaintiff claims that Article VIII, as amended, exceeded the initiative power granted to the people of Missouri under Missouri Constitution Article III.

Defendant now moves to dismiss, arguing that plaintiff lacks standing, that this suit is barred by the Eleventh Amendment to the United States Constitution, and that this Court should refrain from hearing this case under the abstention doctrine.

I. BACKGROUND

During the November 1996 general election, the Missouri voters passed by majority vote a ballot initiative to amend Article VIII of the Missouri Constitution. The Amendment added Sections 15-22 (hereinafter collectively referred to as the Article VIII Amendment) which are intended to promote the passage of a federal constitutional amendment setting term limits for members of the United States Congress. *See* Article VIII, § 15.

Section 16 contains a proposed amendment to the United States Constitution that would limit the number of terms that one individual can serve as United States Senator or Representative.

Section 17(1) directs each member of the Missouri delegation to Congress to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in section 16]." Section 17(2) requires that each Missouri Senator or Representative who fails to support the term limits amendment in one of several enumerated ways shall have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" placed adjacent to that person's name on the primary and general election ballots.

For non-incumbent candidates for Congress, Section 18 requires that they be given an opportunity to take a "Term Limits" pledge each time they file to run for congressional office. For

those who decline to make the pledge, Section 18(1) requires that the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed next to their names on the primary and general election ballots.

The Secretary of State must decide whether words stating failure to support term limits should be placed next to a candidate's name. § 19. In making that determination, the Secretary must consider timely submitted public comments. § 19(2). The Secretary must declare within five days after the filing deadline whether the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be placed next to a candidate's name. § 19(4). After the Secretary makes that determination, subsections 19(5) - (6) give an aggrieved "elector" or "candidate" the opportunity to appeal the Secretary's decision to the Missouri Supreme Court. On appeal, an aggrieved "candidate" has the burden to prove by clear and convincing evidence that the Secretary erred by placing a designation next to his or her name. On the other hand, if an aggrieved "elector" appeals the Secretary's decision not to place the words stating lack of support for term limits next to a candidate's name, the Secretary has the burden to prove by clear and convincing evidence that the candidate met the requirements to avoid having the words placed next to the candidate's name.

Section 20 provides for automatic repeal of Sections 15-22 if the Congressional Term Limits Amendment becomes part of the United State Constitution. Section 21 provides that "[a]ny legal challenge to this Amendment shall be filed as an original action before the Supreme Court of [Missouri]." Finally, Section 22 provides for severability if any portion of the Amendment is declared invalid or unconstitutional.

Plaintiff Donald Gralike is a resident of Missouri's Third Congressional District and more than 25 years of age. He has been a United States citizen for more than seven years and is a taxpayer and registered voter in Missouri. Gralike was a candidate for United States Representative for the Third Congressional District of Missouri in 1976. He is currently considering announcing his

candidacy for that position in the 1998 election. Under Missouri law, Gralike may not formally file a declaration of candidacy until February 1998.

II. STANDARD FOR MOTION TO DISMISS

Because defendant filed an answer in this case before filing her motion to dismiss, this is technically a motion for a judgment on the pleadings under Rule 12(c), Federal Rules of Civil Procedure. However, Rule 12(c) motions are evaluated using the same standard as motions under Rule 12(b), Federal Rules of Civil Procedure. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

In ruling on a motion to dismiss, it is the court's obligation to accept as true all factual allegations in the Complaint and all inferences that reasonably may be drawn from those facts and to construe the Complaint in the light most favorable to the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 1848-49 (1984)). A Complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no facts that would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957).

III. ANALYSIS

A. Standing

Article III of the United States Constitution limits the federal judiciary to resolving "Cases" or "Controversies." *Boyle v. Anderson*, 68 F.3d 1093, 1099 (8th Cir. 1995). The standing doctrine is intended to ensure that a litigant has a sufficient stake in the outcome of a lawsuit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2136 (1992).

In *Lujan*, the United States Supreme Court recognized three elements that a plaintiff must satisfy as an "irreducible constitutional minimum" to have standing: (1) "the plaintiff must

have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) "there must be a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 2136 (internal citations and quotations omitted). The plaintiff bears the burden of establishing the elements of standing. *Id.* at 2137.

Defendant argues that plaintiff fails the first prong of the *Lujan* test. First, defendant argues that because plaintiff has not met the requirements to officially become a candidate for United States Congress, he has no more interest in this matter than any other Missouri citizen. Second, defendant argues that because plaintiff is only "considering" candidacy for the United States Congress, plaintiff's claim of injury or threat of injury is too speculative to support standing.

In response, plaintiff states that when the time comes to declare his candidacy, he intends to do so. Plaintiff points out that Missouri law prohibits election officials from accepting a candidate's declaration before the last Tuesday in February of an election year. *See* Mo. Rev. Stat. § 115.349.

1. Materials Outside the Pleadings May be Considered on a Motion to Dismiss for Lack of Standing

With his response to defendant's motion to dismiss, plaintiff submitted an affidavit entitled Declaration of Donald Gralike. In that statement, plaintiff states his "present intention to run for the United States Congress in the Third District of Missouri in the year 1998."

Plaintiff states in his Suggestions in Response that the Declaration is in response to defendant's Motion to Dismiss. Plaintiff also states that "[b]y submitting this Declaration, which goes beyond the pleadings, it is not plaintiff's intent to convert this motion to a request for summary judgment." Plaintiff's Response to the Defendant's Motion to Dismiss at 1.

On a motion to dismiss for lack of standing, "it is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after all this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S. Ct. 2197, 2206-07 (1975). Therefore, I am permitted to consider the Declaration of Donald Gralike in deciding whether plaintiff has standing.

The statements in the Declaration are somewhat inconsistent with the factual allegations in the Complaint. In the Complaint, Gralike alleges that because of his concerns about the limitations that the Article VIII Amendment would impose on his ability to adequately represent his constituency if elected, plaintiff will not run for Congress if the Article VIII Amendment is valid. Complaint § 32. On the other hand, in the Declaration, Gralike states that he presently intends to run for the United States Congress in 1998. Because I must construe all the materials of record in the light most favorable to the plaintiff, I must resolve any inconsistency in favor of Gralike. Therefore, I will assume for the purpose of ruling on defendant's challenge to standing that plaintiff either presently intends to run for Congress in 1998, or plaintiff desires to run for Congress but will not if the Article VIII Amendment is valid.

2. First Requirement for Standing

a. Plaintiff has a "Legally Protected Interest" Sufficient for Standing

The Supreme Court has taken a liberal view of what constitutes a "legally protected interest." The interest must be more individualized than one which the plaintiff shares with the public at large. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S. Ct. 1055, 1067 (1997); *Warth*, 95 S. Ct. at 2205 (stating that the harm alleged must be more than a "generalized grievance" which the plaintiff shares "in substantially equal measure by all or

a large class of citizens"). Furthermore, the plaintiff must assert his own, personal legal rights and interests. *Lujan*, 112 S. Ct. at 2136; *Warth*, 95 S. Ct. at 2205. However, the plaintiff's alleged interest need not be "significant;" a "small" stake in the outcome will suffice if it is direct. *United States v. SCRAP*, 412 U.S. 669, 687-88, 93 S. Ct. 2405, 2415 (1973). Even purely aesthetic and environmental interests constitute "legally protected interests" if they are concrete and personal to the plaintiff. *Lujan*, 112 S. Ct. at 2137; *SCRAP*, 93 S. Ct. at 2415-16. The Supreme Court has also recognized that a potential candidate for public office has a legally protected interest in becoming a candidate for public office sufficient to satisfy Article III. *Clements v. Fashing*, 487 U.S. 957, 961-62, 102 S. Ct. 2836, 2843 (1982).

Here, plaintiff claims that the Amendment to Article VIII threatens injury to his interest in running for public office. Not every member of the public desires to run for public office. As a future candidate or even a potential future candidate, plaintiff has a greater personal stake in challenging the Article VIII Amendment than does the public at large. Moreover, although plaintiff does allege in his Complaint that he is "generally inclined to be against limitations on terms of members of Congress," Complaint ¶ 28, plaintiff's other allegations state more than merely a "generalized grievance" against the recent Amendment to Article VIII.

Not only does plaintiff claim that he is interested in running for public office, he also claims that he is interested in becoming a candidate for Congress. However, he is concerned about how the Article VIII Amendment would affect his chances of getting elected and how the Article VIII Amendment would affect his ability to adequately represent his constituency if elected. Complaint ¶¶ 32, 36. Therefore, plaintiff has shown that he has a personal stake in the outcome of this matter that is distinct from interests which he shares with the general public.

b. Plaintiff Has Alleged a Sufficiently Imminent Threat of Future Injury to Satisfy the Injury-in-Fact Standing Requirement

In addition to having a sufficiently personal interest in the dispute to satisfy the injury-in-fact standing requirement, the plaintiff must also show that the threatened injury is actual or imminent, not hypothetical or conjectural. *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). However, "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308 (1997) (citation omitted).

One factor in deciding whether plaintiff has alleged an actual or imminent threat of injury is whether plaintiff is challenging a regulation which he himself is the object. When a plaintiff challenges a government regulation that governs the conduct of someone other than the plaintiff, then the plaintiff faces a difficult task to show that the threat of injury to plaintiff is certain and imminent. *Lujan*, 112 S. Ct. at 2137. On the other hand, if a plaintiff challenges a government regulation of which plaintiff himself is the object, "there is ordinarily little question that the [defendant's] action or inaction has caused the injury." *Lujan*, 112 S. Ct. at 2130.

A second factor in deciding whether there is an imminent threat of harm to the plaintiff is the plaintiff's level of certainty that he will engage in conduct that will subject him to injury. *See id.* at 2138. When the plaintiff has been able to state with some certainty an intent to engage in allegedly expected conduct at a relatively specific time in the future, courts have found a sufficiently imminent threat of harm to meet the first element in the *Lujan* test. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212, 115 S. Ct. 2097, 2105 (1995) (holding that plaintiff's statement that it bid on every guardrail project in Colorado, combined with affidavits showing that there had been fourteen guardrail contracts up for bid between 1983 and 1990, created a sufficient certainty that plaintiff would bid on contracts in the future to support standing); *Mausolf v. Babbitt*, 85 F.3d 1295, 1301-02 (8th Cir. 1996) (holding that plaintiff met requirements for standing to challenge an agency's actions in lifting restrictions on snowmobiling because she "swore that she visits the Park at least

twice a year, and described specific, imminent, future trips she had planned"). As articulated by the Supreme Court, a plaintiff has satisfied the imminent threat requirement by showing that injury is "*certainly* impending." *Adarand Constructors*, 115 S. Ct. at 2105 (quoting *Lujan*, 112 S. Ct. at 2138-39 n.2 (emphasis in original)).

In this case, plaintiff has alleged facts supporting a sufficiently imminent threat of injury. First, unlike the plaintiffs in *Lujan*, Gralike is not claiming that he will be indirectly injured by the effects of a state measure aimed at regulating the conduct of third parties. Plaintiff's challenge to the Missouri law is based on how the law would effect [sic] him as a candidate or potential candidate for Congress. Second, plaintiff has done more than merely state that he is interested in becoming a candidate for office at some unknown, future time. Plaintiff has stated that he plans to run for Congress from Missouri's Third Congressional District in the next election in 1998. Declaration ¶ 2. Plaintiff has also outlined his plans to take the formal steps required under Missouri law to declare his candidacy, and has stated that he intends to file for candidacy as soon as Missouri law allows him to do so. Declaration ¶ 3-6. As a non-incumbent candidate for Congress, plaintiff will be subject to the requirements of the Article VIII Amendment, §§ 18-19. In stating his present plans to take specific steps toward becoming a candidate at a specific time in the future, plaintiff has established an imminent threat of certainty impending injury.

Utilizing the alternative assumption about Gralike's intentions, i.e., that he desires to run for Congress but will not do so if the Article VIII Amendment remains in effect, plaintiff satisfies the imminent threat of certainty impending injury factor. In *Clements v. Fashing*, 457 U.S. 957, 961-62, 102 S. Ct. 2836, 2843 (1982), the Supreme Court examined the justiciability of several Texas judges' claims challenging a state constitutional provision that caused judicial officers to automatically resign from their positions if they announced their candidacy for higher judicial office. The plaintiffs were officeholders who alleged that they had not and would not announce their candidacy for higher judicial office because by doing so they would automatically forfeit their

present positions. *Id.* The Court concluded that the plaintiffs met the imminent injury requirement, noting that the plaintiffs had stated:

> In a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision. Given that § 65 provides for *automatic* resignation upon an announcement of candidacy, it cannot be said that § 65 presents only a speculative or hypothetical obstacle to appellees' candidacy for higher judicial office.

Id.

Similarly, here, if Gralike announces his candidacy, he will be subject to Article III, § 18. Therefore, as with the provision at issue in *Clements*, the risk of injury to plaintiff from the provisions of § 18 providing certain restrictions as soon as plaintiff announces his candidacy does not present merely a "speculative or hypothetical obstacle" to Gralike's candidacy.

3. Second Requirement for Standing: Plaintiff Meets the Causation Standing Requirement

Plaintiff has also alleged facts in his complaint sufficient to satisfy the second requirement for standing. Plaintiff seeks to enjoin defendant from enforcing the Article VIII Amendment. There is a direct causal relationship between the challenged conduct--enforcement of the Article VIII Amendment--and the injury--having to face the barriers to candidacy that the Amendment imposes.

4. Third Requirement for Standing: Plaintiff Meets the Redressibility Standing Requirement

Finally, Plaintiff has alleged facts in his complaint sufficient to satisfy the third standing requirement. Enjoining

defendant from enforcing the Article VIII Amendment would remove the disincentives to becoming a candidate that plaintiff claims the Article VIII Amendment creates. Enjoining the enforcement of the new law would also remove the burden that plaintiff claims the Amendment imposes on his chances of being elected and representing his constituents. Therefore a favorable decision for plaintiff would redress plaintiff's alleged injury.

Because plaintiff has satisfied the essential elements of standing under Article III of the United States Constitution, defendant's motion to dismiss for lack of standing must be denied.

B. Plaintiff Meets the Requirements for Injunctive Relief

Defendant argues that even if plaintiff satisfies the requirements for standing under Article III, he has failed to meet the requirements for injunctive relief. In support, defendant cites the Supreme Court's opinion in *Lyons*, in which the Court stated that to qualify for equitable relief in federal court, a plaintiff must show "a likelihood of substantial and immediate irreparable injury." *Lyons*, 103 S. Ct. at 1670 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 674, 679 (1974)). In *Lyons*, the Court held that the plaintiff had failed to meet the requirements necessary to seek an injunction against the defendant's alleged choke hold policy because he could not show a sufficient likelihood that he would be subjected to a chokehold in the future. *Id.*

In contrast to the plaintiff in *Lyons*, Gralike has alleged facts that support his claims that he faces irreparable injury if the Article VIII Amendment is enforced. Here, it is not a matter of speculation whether Gralike will be subject to the alleged illegal government conduct in the future. If he becomes a candidate, Gralike will be subject to the state law that he claims is unconstitutional. Even as an individual who desires to become a candidate, Gralike faces injury because allegedly the mere threat of enforcement will keep him from engaging in conduct that he has a desire to engage in, running for Congress. Therefore, the Supreme Court's decision in *Lyons* is not controlling here. Gralike

has satisfied the requirements for bringing a claim for injunctive relief in this case.

C. Eleventh Amendment Immunity

Defendant's [sic] argues that this suit is barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. Amend. XI. In addition to protecting states from suits by citizens of other states as the plain language of the Eleventh Amendment provides, the Supreme Court has held that the Eleventh Amendment embodies a "broader concept of immunity" that also protects states from suits by its own citizens. *Idaho v. Coeur d'Alene Tribe*, ___ U.S. ___, 117 S. Ct. 2028, 2033 (1997) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890)). Eleventh Amendment immunity extends to suits against state officials acting in their official capacities. *Thomas v. Gunter*, 32 F.3d 1258, 1261 (8th 1994).

However, in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), the Supreme Court recognized an important exception to Eleventh Amendment sovereign immunity. Under the doctrine established in *Young*, Eleventh Amendment immunity does not bar some suits for prospective injunctive relief against state officials acting in their official capacities. *Coeur d'Alene Tribe*, 117 S. Ct. at 2034. *Young* applies in two types of cases. The first, not implicated here, is when a litigant has no forum other than federal court in which to redress an alleged violation of rights. *See id.* at 2035. The second type of case to which *Young* applies is where the plaintiff seeks relief that requires the interpretation of federal law. *Id.* at 2036.

The Court has recognized that whether *Young* applies requires a case-by-case analysis in which a court must balance state interests against the federal interest in enforcing compliance with federal law. *Id.* at 2036-37. In deciding whether *Young* authorizes a federal suit in a particular case, the federal court must look to the

"essential nature and effect of the proceeding." *Id.* at 2038. For example, in cases where the plaintiff seeks to establish ownership over state resources or funds, or where the injunctive relief sought would require the state to pay substantial funds from its treasury, the state's interest in the litigation is so substantial that an action against a state official under *Young* is not justified. *Id.* at 2038-39; *see, e.g., id.* at 2040-41 (holding that sovereign immunity barred suit by Indian tribe seeking to compel state officials to turn over ownership and control of disputed lands and waters); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974) (holding that sovereign immunity barred a suit against state officials when the relief sought required state officials to retroactively pay federal benefits). On the other hand, "[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Coeur d'Alene Tribe*, 117 S. Ct. at 2040; *see, e.g., Millikin v. Bradley*, 433 U.S. 267, 288-90, 97 S. Ct. 2749, 2761-62 (1977) (holding the *Young* doctrine applicable where plaintiff merely sought an injunction against ongoing violations of federal civil rights); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997) (holding that Indian tribe's suit against state officials to enjoin them from committing on-going violations of federal treaty rights fell within the *Young* exception to sovereign immunity); *In re SDDS, Inc.*, 97 F.3d 1030, 1035 (8th Cir. 1996) (holding *Young* applicable in an action to enjoin state officials from enforcing a law in violation of the Commerce Clause).

Here, Gralike asserts that the recent amendment to Article VIII violates Articles I, V, and VI of the United States Constitution, and that enforcement of those provisions would violate his rights under the First and Fourteenth Amendments. Gralike seeks to enjoin Cook from violating federal law by enforcing the Amendment to Article VIII in the future. Gralike does not seek relief that would require the state of Missouri to forfeit control over its funds or resources. Rather, he merely seeks prospective injunctive relief to preclude what he alleges will be an on-going violation of federal law. Therefore, Eleventh Amendment immunity does not support dismissal of Gralike's claims for violation of the United States Constitution.

In her reply, defendant correctly points out that *Young* does not apply to claims against state officials brought under state law. In Count VI, Gralike alleges that the Amendment to Article VIII violates the Missouri Constitution because the Amendment was proposed by the initiative process. Because Count VI alleges a violation of state, not federal law, the Eleventh Amendment protects the State of Missouri from having to defend that claim in federal court. Accordingly, this Court lacks subject matter jurisdiction over Count VI. Count VI will be dismissed.

D. Abstention

Finally, defendant argues that this Court should abstain from exercising jurisdiction in this case because Gralike's federal claims require the interpretation of unsettled questions of state law. Defendant asserts that abstention is proper under the doctrine set forth in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941). Under *Pullman*, a federal court must refrain from exercising jurisdiction over a case that "involves a potentially controlling issue of state law that is unclear, and the decision of this issue by the state courts could avoid or materially alter the need for a decision on constitutional grounds." *Robinson v. City of Omaha*, 866 F.2d 1042, 1043 (8th Cir. 1989).

In general, abstention is the exception, not the rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244 (1976). There are two requirements for *Pullman* abstention to be applicable in a particular case: 1) a controlling issue of state law must be unclear; and 2) a reasonable interpretation of the state law must either be dispositive of the case or substantially modify the federal constitutional question. *Id.* If the unclear issue of state law is "susceptible to a limiting construction" which would render unnecessary the need to resolve the federal constitutional issues, then *Pullman* abstention is appropriate. *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S. Ct. 2502, 2513 (1987). If there is no obvious, reasonable construction of the state law that would resolve the issues in the case, then *Pullman* abstention does not apply and the federal court has a duty to exercise its jurisdiction. *Id.* at 2413.

Defendant argues that because plaintiff has asserted that the Amendment to Article VIII is ambiguous and because plaintiff states in Count II of his Complaint that the Amendment to Article VIII is unconstitutionally vague, the constitutionality of the Amendment to Article VIII rests on an interpretation of the Amendment. Therefore, defendant argues that abstention is appropriate because the Supreme Court of Missouri should be allowed to interpret the Amendment to Article VIII and possibly resolve the alleged ambiguities.

I agree that Missouri courts are the best equipped to interpret the Missouri Constitution. I also agree with plaintiff [sic] that in his Complaint, plaintiff claims that the Article VIII Amendment is ambiguous and vague. For instance, plaintiff complains that Sections 17-19 of Article VIII leave unclear what acts a legislator must perform or pledge to perform in support of a term limits amendment in order to avoid having the negative designation placed next to his name on the ballot. Complaint ¶¶ 39-40. Plaintiff alleges that Sections 17-19 of Article VIII fail to state with particularity how a legislator is supposed to act in specific situations. For example, the Amendment is silent on how the legislator must vote if the proposed term limits amendment set forth in Article VIII, Section 16, has been proposed for a vote but then amended. *Id.* ¶ 41. Plaintiff also alleges that under Section 19, it is unclear what the Secretary of State's obligations are in considering "timely submitted public comments." *Id.* ¶ 43.

Despite plaintiff's claims that the Article VIII Amendment is ambiguous and unconstitutionally vague, however, *Pullman* abstention is not appropriate in this case. First, defendant has not proffered any reasonable limiting construction of the Amendment to Article VIII that would resolve the federal constitutional issues in this case. Second, abstention is not proper where a plaintiff makes a facial challenge to a state statute on First Amendment grounds.

In Counts I and V, plaintiff claims that the State of Missouri lacks the power to impose the restrictions on candidacy for Congress provided in the Article VIII Amendment because

imposed restrictions on candidacy for Congress violate Articles I and V of the United States Constitution. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 115 S. Ct. 1842 (1995) (holding that a state law violates Article I when it has the likely effect of disadvantaging a class of candidates for national office and has the sole purpose of indirectly creating qualifications in addition to those set forth in Article I). Despite any ambiguities in the Amendment to Article VIII, it is clear that the statute is intended to promote the passage of a constitutional amendment setting term limits. It is also clear that the Amendments empower the Secretary of State in some instances to place certain words describing the candidate's position on an issue next to a candidate's name on the ballot.

Plaintiff challenges in Counts I and V the State's power to attempt to require candidates for Congress to take a position on a particular issue. The constitutional questions plaintiff has raised in Counts I and V do not depend on the circumstances under which the Secretary will carry out her legislative directive to accomplish this legislative purpose. The essential issue raised by plaintiff is whether the State of Missouri has the power to legislatively encourage candidates for Congress to support term limits. Any uncertainty about how the Secretary of State is directed to go about advising the electorate of the candidate's position does not impact the essential issue.

Regardless of any clarifying interpretation by Missouri state courts, the issue involving the alleged violation of the United States Constitution would remain.

With regard to Counts II and III, where a plaintiff makes a facial challenge to a state law alleging that the state law abridges his freedom of expression, *Pullman* abstention is not appropriate. *Hill*, 107 S. Ct. at 2513. "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect [sic] the impermissible chilling of the very constitutional right he seeks to protect." *Id.* (quoting *Zwicker v. Koota*, 389 U.S. 241, 252, 88 S. Ct. 391, 397 (1967)).

In Count II, plaintiff alleges that the Article VIII Amendment is unconstitutionally vague. In Count III, plaintiff alleges that the Amendment to Article VIII seeks to require Missouri congressional candidates to take a specific position on term limits. Plaintiff asserts that this constitutes forced speech under the First Amendment. Until these issues are resolved, plaintiff faces a possible impermissible chilling of his First Amendment right to free speech by having to decide whether to run for Congress and face the requirements of Article VIII, as amended. If he decides to run, plaintiff would then have to decide whether to take the Term Limits Pledge or suffer the consequences for failure to take the pledge. Therefore, abstention here is improper.

Furthermore, "[i]n the case where applicability of a statute is uncertain, abstention is often proper, while in the case where the vagueness goes to the obligations imposed by statute, it is not, since a single state construction often would not bring the challenged statute 'within the bounds of permissible constitutional certainty.'" *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 86 n.9, 95 S. Ct. 870, 876-77 n.9 (1975) (citation omitted).

In Count II, plaintiff's vagueness claims go to "the obligations imposed by" the Article VIII Amendment, and not whether the Amendment to Article VIII will govern his conduct if he becomes a candidate. There is no uncertainty that if Gralike runs for Congress, he will be asked to take the Term Limits Pledge and if he refuses, plaintiff runs the risk of having the Secretary of State add certain words after his name on the ballot. Because plaintiff's vagueness claims go to the obligations imposed by the amendments and not whether the amendments would apply to him, *Pullman* abstention is not proper.

Finally, with regard to Count IV, plaintiff claims that the jurisdictional provision in Section 21 of Article VIII violates the Supremacy Clause. However, defendant has not objected to federal jurisdiction based on Section 21. Not only do the parties agree that federal jurisdiction is proper in this case, but neither has offered a reasonable interpretation of Section 21 that the state court might

adopt which would preclude federal jurisdiction. Therefore, even if Section 21 is ambiguous, that section does not provide a basis to abstain in this case.

Therefore, *Pullman* abstention is not appropriate in this case.

E. Certification to the Missouri Supreme Court

As an alternative to abstention under *Pullman*, defendant suggests certification of the state law issues in this case to the Missouri Supreme Court. However, the Missouri Supreme Court has held that it does not have jurisdiction under the Missouri Constitution to render opinions on questions of law certified by federal courts. *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 108-09 (1990) (discussing the Missouri Supreme Court's order in *Zeman v. V.F. Factory Outlet, Inc.*, No. 72613 (Mo. July 13, 1990)). Therefore, certification of questions to the Missouri Supreme Court is impossible.

V. [sic] CONCLUSION

Accordingly, it is ORDERED that:

1) Defendant's Original Motion to Dismiss (Doc. No. 10), filed April 25, 1997, is denied as moot; and

2) Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (Doc. No. 29) is granted as to Count VI but denied in all other respects.

/s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
January 15, 1998